











Title of Pleadings.

R. B. Miller Nov 22. 1825-

Pleadings.

Nature of:

Pleadings are the mutual altercations of the parties to a suit, put into a legal form & set down in writing: (3 Bl. 293. 4 Bac. 1. 10. Co. 132.)

Anciently all pleadings were usually put in by the counsel *viva voce* , and minuted down by the chief clerk: whence they were called in Law-french the Parol: this practice is still adopted in criminal cases: but in civil actions all pleadings are now written. (3 Bl. 293.)

In Eng^d. from the time of W^m the Conq^d. to 36. Ed. 3^d, pleadings were in Norman french: thence to the Commonwealth they were in Latin - during the Commonwealth they were in English: from the Restoration to 4. Geo. 2^d. in Latin: and since that time they have been in English (Lawes Pl. 23. 9. 4 Bac. 1. 3 Bl. 317 24. - In this country they have always been in English. -

Pleadings are nothing more in strictness than setting forth on the record such matters of fact as constitute the ground of Plff's demand on the one hand, or Deft's defence on the other. 7 T. R. 159. Doug 278. 4. Bac. 1.

Lord Mansfield says the substantial rules of plead^g are founded in strong sense and the soundest & closest logic (Lawes 2. 3. 1 Burr 319.) Indeed the rules of plead^g constitute a system of legal logic: and pleading itself is strictly a logical process. There is a great defect in the books which treat of plead^g in not referring to the principles on which the rules depend: they treat them as arbitrary & positive; a cause of great perplexity to the learner. -)

Thus every good declaration or special plea is substantially (tho' not in form) a good syllogism: i.e. it will contain the elements of one: ex. gr. a declarⁿ

2d. cl. fr. may be thus resolved: "Ag't him who has forcibly entered my land, I have a right to recover damages: the Def't has forcibly entered on my land, Ergo I have a right to recover damages ag't Def't: the declaration is thus reduced to its logical elements (2 Bl. 396.)

The major proposition is not usually expressed: for the Judge is presumed to know the principle of the Law *ex officio*: and it is not therefore necessary to shew the law in the pleading; but sometimes the rule of Com. Law is stated as in declaring ag't Com. Carriers, or Innkeepers on the custom of the realm.

Particular customs and private statutes must be pleaded; their existence being matter of fact like any other private document, and tried by an issue in fact: it is not therefore properly an exception to the rule. But a custom being proved, a rule of law arising out of & depending upon it need not be pleaded.

The major proposition contains the legal principle on which the Plff relies: the minor the matter of fact to which the principle applies in the particular case: the conclusion of law is the inference of law drawn from the application of the principle to the particular facts, i.e. from the premises. *Littles, inst. com. ear. ad Ray. 88. 175. 2 Ch. pl. 278-4.*

The Major asserts a rule of law, and is denied by an issue in Law; viz by a demurrer or a motion in arrest of Judgment after verdict. Tho' when a particular custom is pleaded, its existence is denied by an issue in fact for the reason just given. The Minor which alleges facts, is denied by an issue in fact viz: the general or special issue.

But if the two propositions are both admitted the conclusion cannot be denied: for if the principle be correct and the fact coming within it be true, the conclusion is inevitable; and the only defence that remains is to allege new or special matter: as, in case of trespass before cited, a release; which must be specially pleaded and forms another syllogism: thus - "If he on whose lands I have forcibly entered releases the

Trespass, his right of recovering damages agt me ceases: the plff has released 3
to me the trespass complained of; ergo his right to recover damages has
ceased". The plff will then demur to the law, or deny the fact, or he
must shew new matter i.e. plead spec^l which will form another syl-
logism: as "a release obtained by duress does not discharge debt: the
release was thus obtained, ergo &c". Thus all pleading is a syllogistic
process, the great object of which is to facilitate the Administration of
Justice, by simplifying the ground of controversy, so as to make the claim
depend as far as possible on some single point of law; and this is
most admirably attained by the system of pleading at Com. Law.

The Writ. The first stage of a suit is the original writ, which
is a mandatory letter addressed to the Sheriff or other officer, issued to compel
the appearance of deft in court, and the suit commences from the issuing
of the writ (3 Bl. 273. 85. Coup. 454. 7 T. R. 4. 1 Will. 147. 1 Bac. 41. Carth. 233. Vent. 28.
3 Mod. 343. 2 Burr. 960.) The date of the writ is usually fictitious; but if it is
necessary to any end of justice, it may be denied and the true one proved.

In the King's Bench the original writ out of Ch. & is dispensed
with, and the action is deemed to commence when the bill is filed: for
the bill in that court is considered as the original writ (Ch. anch. iio. 2l. 677.
Cro. Jac. 11. 6 Co. 48. 3 Burr. 1323. 2 Hawk 275. Coup. 454.) The Statute
is now in practice a fiction.

But in Common Law there are no fictions: the writ and declaration issue
together, & the suit is not considered as commenced until service. In S. C.
writ only issues to bring deft into court: S. C. does not like the Court
rule. It is often embarrassing to prepare declaration to go out with the writ.

But the cause of action must in all cases be complete at the issuing of the
writ. (1 Roeb. 486. 2 Saund. 377. 2 Co. 24. 5. 4 Bac. 13. 44.)

The first stage of the Pleadings in its extensive sense, being now an collection, laws 75
a generic, is the Count or Declaration (4 Bac. 1. 8. 1 Inst. 17. a. 3 Bl. 293. Plowd. 84.

The Declaration is but an amplification or exposition of the original writ, adding the time, place, & circumstances (3 Bl. 293. Carth 334. Salk 219. 4 Bac. 3.)

The words declaration & Count are often used as synonymous, and when there is but one statement of the cause of action, they are so: but where plff makes several statements each is a count, and all taken together are the declaration. A declaration is a plea as much as any plea in bar. Carth 304. Salk 219. 1 Saund 338. n.a. Lawes 1.2.)

Pleadings in the more limited sense of the word, mean those which follow the declaration, and are composed of those allegations which deff makes by way of defence, and on the other hand, those which plff makes to fortify his suit or declaration (4 Bac. 1. 6. Lawes 1.2.) The first of them is deff's plea (2 Bl. 294.) which is of two kinds viz. 1. Pleas Dilatory. 2. Pleas to the action (3 Bl. 301. 4 Bac. 1. 6.)

I. Dilatory pleas. are such as tend to delay the plff's eventual remedy, by questioning the propriety of the mode by which the remedy is sought, rather than the right of action itself which it does not deny. They are of three kinds. 1. To the Jurisdiction of the Court: 2. To the disability of Plff. 3. Pleas in abatement properly so called, for all dilatory pleas are in common parlance denominated pleas in abatement. (3 Bl. 301. 302. Ch. n. Bac Pleas. 4. 1 Tidd 572. Lawes 37. Id. Coke has 6 divisions - unnecessary. -

II. Pleas to the Action are answers to the merits of Plff's demand: they are so called because they deny the right or cause & not the form of his action. This may be done by pleading in either of three ways as 1 by denying the plff's allegations: 2 by confessing and avoiding them, or 3^d by matter of Estoppel. (3 Bl. 303. 5. 6. Lawes 37. 3. 115. 31. 4. 5.) which neither denies nor confesses the allegations, but precludes his right of alleging them, by shewing a former judgment &c. Pleas to the action are of two kinds. 1. the general plea - 2 a special plea in bar (4 Bac 54. 124. 30. 3 Bl. 306: the general issue is also a plea in bar.

A cause of action may also be denied by demurring to the declaration; but 5
this is not strictly a plea; it is called an excuse for not pleading. It admits
all the facts alleged in the declaration, but denies their sufficiency
to compel him to plead to them: and he prays judgment whether he
shall be compelled. (4 Bac. 129. 30. Co. Litt. 72. a. 5 Mod. 132.)

General Rules.

In all pleadings two things are to be observed:

1st The matter or facts alleged must be suff^t in point of Law: 2^d It must
be expressed or alleged according to the forms of Law. The omission of either
of these requisites is a defect and ground of demurrer. Where the facts are
deficient the defect is one in substance: when in the manner of stating
them it is one in form only. (Hob. 164. Comp. 683. Lawes 45.)

As a gen^l rule it is necessary to state only facts, and that the case
is a conclusion from them: i.e. facts as they exist actually, or by fictions
or presumptions of Law. It is sometimes necessary to state facts which
never existed: as in Ind^t. Ad^t the (implied) promise must be expressly
alleged, tho' none were ever actually made - the Law presumes a prom-
ise from the fact of indebtedness. It is never necessary to state mere
matter of Law. (1 Chitty 216. 5 T. R. 70. Lawes 46. Doug 159.)

Stating the mere evidence of facts is not suff^t: the facts
themselves must be substantially alleged; for the court cannot infer
a fact from evidence offered to it: as in the case above stated, Indebtedness
as evidence of a promise to be presumed by legal fictions is not suff^t
unless the promise be expressly averred. (2 Rostr 73. 4. Cro Jac. 383. Ch. 196. 7
278. Lawes 49. 1d R. 1517. Cro. El. 913. Selk. 663.)

So stating a demand & refusal in trover, is not suff^t without a special
avowment of conversion: for demand & refusal are not ipso facto a conversion,
but merely evidence of it.

There seems to be an exception to this rule in the case of a bill of exch:

6 in an action agt drawer or on promissory note agt maker, it is not necessary to allege a promise: drawing the Bill or making the note, says Ld. Holt, is an actual promise, and alleging that fact is sufficient. J. G. is not satisfied with the rule and recommends to allege the promise. (Keyd on Bills 196. Salk. 128. 2 N. Rep. 63. Ld. R. 538. Stra. 224. 4 Mass. Rep. 451.)

The rule does not hold in action agt any of the other parties. —

All pleadings shd be direct, and not argumentative, nor by way of inference or recital: the rule is confined to Material traversable facts, for if a fact is alleged only by way of inference, it cannot be traversed: thus in trespass if he declares "whereas trespasser deft vi et armis &c" it is ill: it should be "deft did" for otherwise the traverse would be "whereas I did not &c" and there would be no distinct issue. The rule therefore admits of some qualifications. (4 Bac. Lawes 75. b. 130. 2. 4. 1 Co. Litt 303. 4. 4 Bac. 97. Plowd 128. Yelv. 223. 7. T.R. 458. Lawes 274. n. 4. 3 Leon. 200. Mass. R. 358.) The words "Pro. eo. quo" "licet" "quia" &c are sufficiently positive Yelv. 12. 1 Saund 117. n. 164. 1 Lev. 194. Vent. 278. 2 Bos. 447. 12 Geo. 2 Ch. 197.

Each party admits so much of his adversaries traversable allegations as he does not deny: for what he omits to deny he admits by implication. (4 Bac 273. Salk. 291. 1 Wils 338.)

Each party's plea is to be taken in construction most strongly agt himself, for each is presumed to make the best of his own case. If then the language of the plea admits of a double construction, that which operates most strongly agt the party making it is to be taken. (4 Bac 2. 1 Co. Litt 303. Hob 234. 2 Latch 181. 2 H. Bl. 530. Lawes 52.)

It is an important rule in pleadg that where a fact is issuable or traversable, a time & place when & where it is supposed to have happened must be shewn for the information of the adverse party the jury and the court: but there are some exceptions, as where negative matter is pleaded no time or place need be alleged: when time is alleged, place must

be good² & converso; but not always. Com. D. P. C. 19. 20. Plowd. 24. a. Talk. 6.

To where the action is trespass, or a parcel count &c there is no need of stating the time & place. See vide Pleas in Abat^{ent}. venue. Com. D. P. C. 69. Bro. Jac. 183. Civ. El. 82. —

Either party may expressly admit any allegation on the other side operating in his own favour, and thus make it a part of his own cause. Lanes 48. 143. 4. Peak. 26. 45. 2. Mod. 5. 4 Bac. 2.) L. G. says there is no need for an express admission: for what is said by one party in favor of the other, must operate for him whether admitted or not.

The number, quantity or price of a thing need not be stated truly, except when a mistake in this respect would make a variance. In that case it is fatal; as in the subject matter or terms of an express contract or record. (Lanes 49.) Thus a person may declare in trespass or trover for 10. horses & recover but one; or lay their value at £100 & recover but £50. So in Tresp. In. cl. fr. Deft may be charged with the destruction of 50 trees & only one be proved: yet plff will recover for that one; here is no variance. — But if a promise to pay £100 be laid & one to pay 99 or 200 be proved; or a contract be declared on as dated 1 June & one dated 2^d be proved, the mistake is fatal: the contract here shown is diff from the one alleged & there fore a variance. —

More Surplusage does not vitiate any plea: it is something foreign to the case & will only be rejected. But

Repugnancy does vitiate. Rep. in a material point is a fault in substance & incurable - in an immaterial point it is only a fault in form, of which advantage can be taken only by a special demurrer. (2 East 323. Co. Litt 303. Lanes 63. 4. 5. 170. 4 Co. 42. 4 Bac 294.) So also of Indictments (Leach 113.)

Every thing it is said sh^d be pleaded according to its legal effect and operation, tho' it sh^d vary from the real form of the thing pleaded. (This is the most lawyer like method)

Thus a covenant never to sue a debtor sh^d be pleaded as a release, otherwise it is no bar. So a conveyance by one tenant to another must be pleaded as a release not as a feoffment, both being seized of the whole. So also a grant from a tenant for life to reversioner must be pleaded as a surrender, that being the only mode of conveyance between such parties. And the Law will so construe them *ut res magis valeat quam pereat*. (4 Bac 100. 1 Inst. 193. b. 200 b. Doing 642. Comp. 577. 15. d. 640. Com. D. Pl. C. 37. Lawes 62. Saund 96. 7. Id. Ray. 400.) As to fictitious payee ^{ch. 13. 1857} ^{184. Pl. 3131}

But the facts may be pleaded as they actually exist; the Court will apply the rule of law & give them their legal effects. (2 H. Pl. 11.)

That which appears already on the record need not be formally averred (4 Bac 2. 1 Co. Litt 303. Plond. 64. 81. Cro. Jac 362. 7. Co. 54. a. 11. Co. 25. 7. Co. 90. 2 Rot 247. Lawes 48. 2 N. R. 77.)

Thus in an action of trover for \$100: the value thereof need not be stated afterwards, for it is apparent on the face of the Declaration: but the value must be averred, unless it appears otherwise: as in Trespass for a horse the value of the horse must be stated.

Circumstances necessarily implied in facts which are stated, and facts presumed by law, need not be expressly alleged. (Lawes 48. 13 d. 303. 2 Ch. 214. Salt. 91. 2 Saund 305. a. n.) thus in pleading a feoffment it is unnecessary to allege livery of seisin, for that is implied in the act of feoffment. (1 Ch. 226. 7.)

When Law & fact are so blended in a plea as not to be distinguishable, it will: as where A sues B for false imprisonment, & B justified by alleging that he was Staff: he ought to have averred that he had legal warrant, which might be traversed. (9 Co. 152.)

What is admitted by both parties in pleading, cannot be contradicted in plead by themselves nor by the jury: the reason is obvious: the jury are to find nothing but contradicted facts & if their verdict were

4 Bac. 68. n.
Lawes 153.
2 Mod 55.

to deny what is admitted by both parties, it would be a mere writing in law. 9
(4 Bac. 2. 2. Mod 5. Bull. 289. Lawes 48.)

General estates in fee simple may be generally alleged; i.e. it is necessary to state a seizure in fee in genl terms, without saying when it commenced or how it was acquired. But the commencement of a particular estate ought to be specially shewn. The reason is that a fee simple may commence in wrong, which is a mere matter of fact, of which the Jury are competent Judges: as by the dissen of the rightful proprietor - but no other estate can so commence. A particular estate commences by some act of Law, as Deed &c of which the Court is to judge. - This rule tho' true in all other pleadgs is not so of the declaration: for there a part^r estate may be stated by way of inducement, and it is not material what estate is alleged: thus in trespass qu. cl. fi. any estate may be alleged. -

(Lewes 47. Sta. 385. Id. Ray 331. 3. 4. 8 Wils 72. Co. Litt 303 b. Cro. Car. 938. Salk. 572.)

All material averments when denied must be regularly proved: There is a great difference between immaterial & important averments. An immaterial averment is one which need not have been made, but being once made becomes essential: Impertinent averments are such as are entirely foreign to the subject & never need be proved. Immaterial averments must often be proved or the party making them will fail: as when they relate immediately to the point in question: viz. where a variance is the consequence of not proving them. (5 Esp. 312.

East 446. Lawes 48. 2 Mack. 371. Bull 5. Esp. de. 521. 17. R. 235. 1 Chitty 294.)

Id. Mansf^d says if an averment is so entirely foreign to the subject, that it might be left out without injury to the plead^g it is impertinent and need not be proved: otherwise it is immaterial (Chitty 309.)

The former rule may be illustrated thus: If in an action of Trespass Def^t be described as heir at Law of D. D. the averment is impertinent, and

and whether he be the heir of J. S. or not is a question that does not affect the case at all. But if a landlord sue a stranger for taking off his tenants effects so that he cannot detain them for rent, & allege that rent was due on a lease payable Quarterly, if he proves that it was payable annually he fails in his action: here tho' the averment was immaterial, yet since he has made it he must prove it, (2 Bl. R. 1107. Doug 640. 669. 2 East 446-97 3 J. R. 643. 5 East 31. 3. Lawes 48. Bull 5. Chitty 221. 2. 2 Tamm 202. a. n. 24.

The rule requiring immaterial averments to be proved as laid, is now confined to the pleadings of records and express contracts; for variance is predicable of these only. (The Editor of late ed. of Douglas p. 640. n. confines the rule to records & written contracts; but I think it extends also to express parol contracts, for they are as much liable to variance as if they were written J. G. 24. Bl. 704. M. Nall. 513. Bull 5.)

If the Declaration or any other part of the pleadings wants form, or omits to state the necessary circumstances of time or place, it is regularly aided by the adverse party pleading over instead of demurring specially. Thus when one makes Duplicity in his pleadings, as if he omits the Defect in pleading a deed, his plea is good if replied to.

But when defect is in the substance of plea nothing can aid it: this is an important distinction. (4 Bac 2. 7 Co. 25 a. 8 Co. 120. 1 Co. Litt 203. 1 Lev 195.)

Neither party is bound to allege more than will prima facie amount to a sufficient cause of action, or to a sufficient defence to his opponent: thus Plaintiff in contracts must always negative the plea of payment; for he must assign a breach to complete his cause of action: still he need go no farther. (2 Wils 100. 2 Burr. 1037. Id. Ray. 400. 1 Tamm 299.) But pleas of Abatement and Estoppel are not thus favored in Law.

If the pleadings on one side expressly aver a material fact in favor of the opposite party, omitted by him, the omission is cured: and in this way a party may furnish his opponent with a good cause

of action or defence agt himself; for it will then appear good from the whole record. (Coni. di. Pl. c. 35. E. 37.) Thus where A sued B. in Resp. for taking a certain horse, but did not aver possession which in that action is indispensable, B pleaded in justification "that tho he took it from A, yet &c" (affirming matter of justification) Verdict went agt B. who moved in arrest of judgment that A had not alleged possession: but said the Court, you have helped him out by admitt^g possession. (1 Sid 184. Esp. di. 588. 5 Bac 197.)

New matter alleged in any part of the proceedings after the declaration must conclude with a verification "hoc paratus est verificare" that being the only established mode of keeping the pleadings open. (3 Bl. 309. Doug 58. 1 Saund 163. n. Corp. 575. 2 Barr. 775.)

In any part of the pleadings, either party has a right to meet the allegation of his adversary either by denying them; or by confessing and avoiding them by new matter of his own; or by demurring to them. This may be done by either party until a proper issue is tendered, provided the plead^{gs} are kept open by a verification (Laws 148. y. 50. d. 1 Saund 103 n. 1. 3 Bl. 309. 10.) To this rule there is an exception in Eng^d by Act 5 Geo 2 in the single case of a plea of Bankruptcy. (Laws 115. 224. y.)

Thus if Deft pleads a Special plea in bar, Plff may reply in either of the modes above mentioned as by denying &c: but he would be defaulted if his right of the plead^{gs} were not kept open; as if Deft after alleging new matter might conclude by tendering an issue: the plea must therefore conclude with a verification.

The diff^t stages of the plead^{gs} are 1. Declaration. 2 Plea in Bar. 3 Replication. 4 Rejoinder. 5 Surrejoinder. 6 Rebuttal. 7 Surrebuttal. (3 Bl. 310.) Pleadings have never been carried farther than this, tho' the attempt has been made. The object of a Plea in bar is to defeat the declaration. That of a replication to fortify it by defeating the Plea: of the rejoinder to fortify the plea by defeating the

Replication and so on thro' the whole: the object of each party being to fortify what he had said by defeating what was advanced by his adversary. (4 Bac. 8. 1. Inst. 304. a. 3 Bl. 310. Plowd 607. Id Raym. 1169. Show. 122. Bull 17. 2 H. Bl. 280.)

Pleadings not answering these purposes are bad: for each party must always abide by his original ground of action & defence.

Judgment is always rendered upon the whole record, and not any single detached part of it: thus if the declaration & plea be both bad, and the plea be demurred to, the Judgment must still go for the deff: for the plea tho' bad, is good enough for a bad declaration. The Court will always go back to the first substantial defect, and give Judgment on that. So if the Declⁿ be good and the Plea & Replication both bad, Judgment must be for Plff: for a bad Repⁿ is good enough for a bad Plea. The same rule holds throughout all the stages of the Plead^g. (4 Bac 7. 1 Saund 56. 285. Hob. 199. 200. 3 Co. 120. 133 b. 4 do 110. Chitty 243.)

Declaration

The Declaration is a statement in a methodical & legal form, of the circumstances which constitute the Plff's cause of action. (Chitty 243. m. Co. Litt 17a. 302. a. Com. D. Pl. 6. 7. Bac. Abr. Pld. B.)

The declt being the foundation of all the subsequent plead^g, & of the suit itself, must contain all that is essential to Plff's right of action: for nothing can be proved which is not alleged. And unless every thing ~~alleged~~ alleged which is material is proved, he cannot have judgment. (4 Bac 6. Laves 68. Plowd 84. Hob. 199. Ch. 255.)

If then the Decl^t tho' otherwise sufft, contains any fact, which shows that at the time of commencing the suit, the Plff had no cause of action, he never can recover. Thus if in debt on Bond, Plff states the day of its date or day of paymt to be after the date of the writ; here it appears on the face of the declaration, that at commencement of suit he had no cause of action. (2. Saund 397. 7 Co. 24. 5. Plowd 84. Co. 2. 325. Co. Sac 574.)

A judgment for Plff in such case would be erroneous even after verdict: for the defect is incurable. Comp 454. 3 Bl 273.) 13

But if a party bound by a contract disables himself to perform, he may be sued, he may be sued before the time fixed for performance: as if A covenant to convey land to B. in six months & before that time conveys to C. (5 Co. 21.2.)

The omission of any thing which is of the gist of the action is incurable defect. By Gist is meant that without which there is no cause of action in law, and without which Plff cannot have judgment. *vid. arrest of judgment* as if in an action of Ass^{ts} no consideration is laid, or in Treas^{ry} no conveyance &c. (4 Bac. 3. 5 Mod 305. 3 Bl 395. Doug 658. n 671.)

If there is such an omission Deft may demur, or if he pleads issue and verdict is ag^t him he may arrest judgment: or bring a writ of error 4 Ba. 3. Doug 658. 3 Bl 395. 4 T.R. 473. 2 Bl 201. 4 T.R. 472.)

When Plff's right of action is to accrue by performance of a condition precedent, he must aver performance, or some thing equivalent to it in the Declaration: thus if A promises to pay B £100. in considⁿ that B builds a house for him, B in suing for the money must aver that he has built the house. an averment that A had not paid the money without more would not be suff^t: the omission in this case is averable. (4 Bac 16. 7 Co. 10. a. 1 T.R. 645. 7 do. 125. 1 Saund 319. 20.)

But when Plff's right is qualified by a condition sub^t, he is not bound to take notice of the condition, for it is matter of defence for Def^t & he must plead it. Thus in an action on a penal bond for \$100 conditioned for payment of \$50. Plff is not bound to take any notice whatever of the condition: but may declare upon the penal part as if it were a single bill only: he may indeed set out the considⁿ and aver that \$50 has never been paid, but there is no necessity for doing it. (4 Bac 16. 7 Co. 10. 11. 1 T.R. 638. Esp. d. 300. 1 H. Bl. 254. 2 do 574. 1 Chy 310. Com. Di. Pl. C. 54.)

So if there are reciprocal independent promises or covenants. Plff need not aver performance on his part: But where they are dependent, he who sues for non performance on the other side, must aver performance on his part. Thus if A promises to pay money to B in considⁿ of B's promise to deliver him goods the covenants are independent, & B in suing for money need not aver delivery of goods. But if A promises in consideration of B's delivering the goods, the covenants would be dependent, and B in suing for the money, must aver the delivery of the goods. (4 Bac 16. Co. Jac 654. 2 Mod 309. Comb. 265. 3 Bulst 187. Hob 88. 1 Vent 177. 5 Co 10. 2 N. R. 240. a to c. notes. 1 Chy 310-15. 1 Pow. C. 369.)

10 Solm. 90
" " 266.

Exceptions in the enacting clause of a shab must always be negatived in suing upon the shab. But exceptions in the separate substantive claims need not be. (vide. Municipal Law.).

So also exception in the body of a covenant must always be negatived in an action of covenant Broken. But exceptions in a distinct substantive provision need not: same reason (vid. Covt Broken).

Certainty is a quail requisite in Pled^t & every decl^t must contain it: i.e. the averments must be certain & this for several reasons - 1st That Def^t may know how & what to answer - 2nd That a quail issue may be joined and found. 3rd That the court may know how to give judgment - 4th "in hac omnia" That Def^t may be enabled to plead judgment in bar to any subsequent action for the same cause. (5 Co. 34. 4 Burr. 245. 5 Bac 272 - 1 Day 315. Chy 250.)

Certainty must extend to parties, time, place and subject matter: all these must be set out with convenient certainty. (Lanes 527. 4 Bac 8. 1 Co. Litt 303. Co. 2l. 78. 97. 5 Co. 35. 1 Vent 272. Chy 237. a 58.)

But no greater certainty is required than the nature of the case will admit. It is said to be suff^t if the jury can know from the description what is meant. (Co. 2l. 817. 1 Ber 53. Salk 628. 1 Day 315. Sta 637.)

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This rule applies principally to descriptions of the subject matter; for as to time, place, &c. they may always be described with sufficient certainty - for examples vide 4 Bac 25. 2 Saund 74. 5 Bac 272. 5 Co. 34. 5 Bac 272 2 Vent 114.) It is difficult to see the rule of distinction in these cases and the decision depends much upon the particular facts of the case.

Land can be described with more certainty, and it is usual to state the town & county where it lies, with the boundaries &c. -

With respect to matter of inducement and aggravation, the rule requiring certainty is less strict: for they are not of the gist of the action and not issuable. (Post) Lawes 71. 2. 118.)

By inducement is meant matter introductory to the principal subject, Salk 66. 7. but necessary to explain and introduce it: it gently comes in under a "whereas."

Matter of Aggravation is that which shows circumstances of enormity attending the principal act complained of, and is a ground for enhancing damages (Lawes 66. 70) It is predicable of Torts only.

The words "said" "aforesaid" and others of similar import are not sufficiently certain when there are two antecedent subjects to which they are referable (8 T. R. 178. 2 East 66. 2 Ld Ray 888.) The court will not of course refer them to the circumstances last mentioned: hence it is necessary to use the terms "first aforesaid" "last aforesaid" or others of equivalent discriminating import.

A Declaration may be ill in part for uncertainty, and yet good for the residue, tho' there be but one count; so as to warrant a partial recovery: as if one sues in Trover for two chattels one of which is sufficiently described and the other is not; he may recover on the one and not on the other. (Com. D. Pl. C. 32. Lawes 59. 1 Salk 218. 1 Saund 286. n. 2 ib 379.)

If one declare upon a contract or conveyance to the validity of which a deed or written instrument is necessary by the Com. Law, he must plead such deed or instrument; as a grant of incorporeal hereditament, or release which

can only be by deed. So if one would plead a contract or conveyance unknown to the Com. Law, but authorised by Stat. and required by Stat. to be in writing, he must plead it as written: as in the case of a Deed of Lands. -

This is necessary on the genl principle, that a party must allege all that is necessary to his cause of action or defence (6. Co. 38. 43b. 2 Wils 376. Falk 519. 4 Bac 656. 12 Mod. 541. 1 Bac 15. Bull 279.)

But in declaring on Cont. good at Com. Law without being written, but required to be written by a Stat., it is unnecessary to state that they are in writing: as on Cont. contemplated by Stat. of Fraud & Perj. - for here the writing is not an instrument creating the right on which any action can be founded, but mere evidence of an agreement by parties.

These Contracts being good at Com. Law without the writing, and the Stat. having altered the rule of evidence only and not the rule of pleading, the latter remaining as at Com. Law. (1 Bac 75. 4 id 455b. 3 Burr. 1890. Corp 289 12 Mod 540. Bull 279. Falk 519. Robt. Fr. 202-4, 1 Rish 79. 2 Bac 146.)

If however any such agreement be pleaded in bar, it must be averred to be in writing, because greater strictness is required in bar than in declaring (Bull 279. Id. Ray. 450.) for the plea in bar acknowledges a right of action in Plff, unless that right is taken away by the Plea itself.

If Deft demurs to a Declt. on an agreement which ought to be in writing according to Law, he admits thereby that the agreement is in writing, and he can never afterwards take any advantage of its being unwritten: for if the Plff had a written agreement, the demurmer prevents him from adducing it as evidence. (7. T. R. 357. Falk 159. Corp 289. 12 Mod. 540. Bull 279.)

A Declaration may be either general or special: General, as in the action of Indeb. ass. where plff merely sets out that Deft being indebted to him in so much money "assumed and promised" &c. Or in Declt on bond, where plff sets out the Penal part only.

Special as in Ind. act. where Plff states all the circumstances of Def^t's coming in debt'd & "promising" &c. or in debt on bond when he states the condition and non-performance (4 Bac 8. Doehina Plac. 84.)

Plff in declaring on deed or instrument, need not set out any more of it than is necessary to entitle him to his action (Doug 643.)

In declaring in act. the word "agreed" is tantamount to "promised" (2 N. Rep 62. Tulk 663. Ld Ray 1547. Cro. El 912.)

When two or more persons are jointly interested in a right Joinder. to be asserted by action, they may and ought regularly to join in an action whether it be founded in contract or tort. As in the case of joint obligees on a bond: both must join, for the right is in neither alone, but both together. (1 Saimd 153. 291. 5 Co. 18. 4 Bac. 9. Co. Litt 164. Dyer 270. 2 Leon 12. 5 J. R. 657. 1 Bac 532. 2 H. 176.)

Jointenants were formerly required to join in all actions relating Plt's to their joint estate; but now they as well as coparceners & tenants in common may join or sever at their election (2 Rest 57. 2 Cases 167.) This rule supposes that they sue to recover their estate: but if they sue only for damages done to the estate they must all join in the action for their damages cannot be severed. —

When the right to be asserted is in one person only, another cannot join — for the Def^t cannot be made answerable to a stranger: and in such case the misjoinder is pleadable in bar, or advantage may be taken of it under the joinder issue. The joinder issue contradicts the count, for when A promised to pay B, he made no contract with B & C. (Cro. El 143. 1 Leon 315. vid post pleas in abatement). —

Under this rule, if A delivered goods to B. to be delivered over to C. and B does not deliver them, either A or C may in some cases sue them (vide Bailments,) but they cannot join in one action, for the right of each is several, and they have no joint-interest. (4 Bac 910. 1 Bulst 68. Ward 321. Chy. 320. a 220.)

In actions brought by Ex'rs as such, all those named in the will must join, tho' one be under age, or has not joined in proving the will, or even has refused the trust: for he may afterwards prove the will, or change his mind & accept the trust. But the omission of one of them is pleadable. *Foll. 446.* in abatement only (1 *Sund. 291. Yelo. 130. Salk 3. 9 Co. 37. 1 Vent 95. Chy 3.*)
Soll 446. And when one of the Ex'rs continues to refuse to act, there may be a sum-
 mons & severance & then the suit may proceed without him (*Ex. Car 520.*)

If the several rights of two or more are invaded by one and the same act, they cannot join in an action for the violation of the rights, and of course the remedies of each are distinct from those of the other. Thus if actionable words are spoken of two at the same time, they cannot join, so if two are beaten together, they must sue in distinct actions, for their rights are several (*4 Bac 10. Owen 66. Co. Car 572. Esp. d. 409. 504. Bull 51. 4 Bac 411. Yelo. 129. 2 Wils 409. 27. 2 *Sund 215.*)*

If one of two or more joint obligees, covenantees, or promisees dies, his Ex'r cannot join the survivor in an action on the covenant bondable. And the rule is the same when one of two joint plffs in an action of covenant dies; for there remains no joint right at Law. It is severed by the death, and the right of recovery survives to the surviving obligee &c. (*1 Bull. N.P. 145. 1 East 497. 1 Chitt 11. 12.*)

If indeed the covenant be with two persons severally, and their interests are several, each on his own death transmits his own rights to his own representative: his Ex'r may then sue alone as for him, (*vid. Covt. B.*) and when the cause of action arises out of the joint act or default of two or more, they may be joined as Def'ts and in the case of Contract must be joined in the old action of they must be joined, for it cannot be brought ag't one

When the cause of action arises out of the joint act or default of two or more; they may be joined as Defs., and in the case of Contract must be joined: thus if two join in committing Tresp. or Malicious prosecution the injured party may sue them both, tho' he is not obliged to: he may sue one alone or each severally; torts being in their nature joint and several. (4 Bac 10. Holt 6. Latch 262. Bull N.P. 52. 3 Bl 117.)

So if two join in publishing a libel; for it is a joint and common act (2 Burr. 555. 2 T.R. 149.)

But two cannot be sued in one action for distinct torts, committed by them severally; for there is here no joint act: thus if two persons at the same time & place utter the same words ag't another, they cannot be sued together: it cannot from the nature of things be the joint act of both. The case above mentioned of Tresp. Mal. Pro. & libel are acts in which two or more may be concerned, but it is not so here (4 Bac 10. Bull 5. Palm 313. Co. Fac. 674. 119. 1 Bul 15. Esp. d. 574.)

And fortiori then, if one is injured by the several acts of two or more at diff't times, they cannot be joined. as if A shd. beat C. now. & B shd. do it afterwards, there being no concert or previous design (4 Bac 10.) The torts would in that case be distinct. -

If two or more are bound by a joint contract, they must all be joined in the action (2 Ves 99. 3 Bac 497. Talk 393.)

But if the contract be joint & several, either may be sued alone, or each severally or altogether: but if more than two be jointly and severally bound, the Plff cannot sue more than one without joining all: the Court must be treated as altogether joint or altogether several. (Feb 26 3 Bac 698. 1 Sid. 235. 8. 3 Freem. 782. 1 Saund. 291. C.N.)

If two or more bind themselves by one & the same contb. it is joint, of course & not several: unless the terms of it imply a several duty or obligation. Thus when two or more make a promissory note which merely says "we promise to pay" without more the obligations are only joint. (3 Bac 698. 2 At 31. Chy. B. 175. 1 H. Bl. 236. 5 Burr. 268. vid Goff R.)

If two persons enter into a joint bond and one dies, his ex'r is not liable at all at Law to the obligee: he cannot be sued alone, or jointly with the

Survivor: the only remedy is against the Survivor (1 East 400)

But if the obligation were joint and several, the Ex^r of the one dead would be liable: in this case he cannot, probably, be joined with the surviving obligor, tho he may be sued alone: for so far as the contract was joint, it survives agt the survivor alone.

In suing Ex^{rs} all who have administered or acted in pursuance of the trust must be joined. 1 Saund 296. Lev 161. Com. di. abate f. 10. D. R. 507. - for Plff has no legal mode of knowing who the Ex^{rs} are except by their acts; and if he were obliged to sue the whole he might entirely lose the remedy. no man is obliged to subject himself as Ex^r, & any one of them by refusing the responsibility would defeat the action. -

Joinder
of
Causes
of
Action

It is a genl rule that several causes of action of the same nature and between the same parties, may be joined in the same declaration: but each distinct cause of action is to be laid in a distinct count: thus if A. holds several notes of hand agt B. he may sue upon them all in one declt. making a Count for each; or if B is indebted to A on several promises or several bonds two or more may be stated, but in diff^t counts: otherwise there would be duplicity. Com. D. act. G.

By causes of action of the same nature is meant such as require the same judgment at Com. Law. viz. a "Capiatur" or "Misericordia". These are the only kinds of judgments at Com. Law. (5 Bac 191. 4 it 11. 2 Wils 319. 1 Wms 366.) The genl rule then, means that if several causes of action require the same judgment of Capiatur or "Misericordia" at Com. Law, they may be joined: for this makes them of the same nature: this rule tho' genl is not universally true. (1 Wils 152. 1 J. R. 276.)

It is a universal rule that if several causes of action all require the same judgment. and the same genl issue, they may be joined. thus ~~of~~ debt may be brought on any number of bonds: ass^t on any number of notes &c. (1 Wils 252. 1 J. R. 271. 1 Chy 197.)

Here it is taken for granted that Plff, in all the different claims, sues in the same right, & debts sued in same characters. Otherwise there would be a misjoinder of counts. I. G. would say that it was in the nature of a misjoinder of parties. - (1 Saund 10. 1 J. R. 489. 3 it 659. 4 it 280. 1 Wils 17. 2 Sta 1271.

Whether Ejectment and assault & Battery could be joined has been doubted. (4 Bac. 32.)

In Ejectment the nominal is not the real Plff: hence the Plffs in the two counts would appear from the record itself to be different persons. Ejectment is founded also on a legal fiction, hence J. G. thinks it cannot be joined with any other action. Tho. Ejectment & Assault & Battery sound in Trespass & both require the same gen'l issue, yet they probably cannot be joined on account of the peculiar structure of the action of Ejectment, and the fact that the nominal Plff is not the real one. So that the Plff in the count for Ejectment cannot appear to be the same as the one in count for Assault & Battery.

Several Trespasses may be joined: as assault & battery at one time; false imprisonment at another. So of Trespass on the case (8 Co. 7. 8. 1 Vent 293. 223. 2 Bl. R. 348. 1 Wils 252. 2 & 319. 3 East 90. Corp. 230. Doug 652.)

One Count in Trover, one in Slander, & one for Mal prosecution may be joined: all of them being Trespasses on the case "ex delicto" and gen'l issue and Judgments are the same (Corp 230.)

In some cases when Judgment only is the same, the pleas being different, there may be rejoinders. as debt & detinue: for their general issue is the same. debt being a sort of detinue for money, and detinue a sort of debt for specific Chattels. and also debt on bond & one on may be joined. (Ro. Car 20. 210. 1 Vent 366.)

But causes of action of the same nature belonging to the same person in different rights, cannot be joined: as one count of ass't for money had & received to the use of Deft as Ex'r, & another in his own right; here Plff claims in two different capacities, so that the case is analogous to that of several rights of action existing in favour of two distinct persons. (Chy 200. Salk 10. 1 W. R. 489. 3 ib 639. 1 Wils 179. Stra. 1271. 3 B & P. 7.)

A count however for money had & received by Ex'r's Testator may be joined with one for money had &c to the use of the Ex'r as such. (3 T. R. 657. 3 East 104.)

But causes of action of different natures, requiring different judgments at Com. Law can never be joined in one declaration, even tho' the gen'l issue were the same. Trespass & Contract can never be joined; for here the Judgment & gen'l issue are both diff't. (Salk 10. 1 Bac 30.)

Nor can Trespass & Trespass on the case ex delicto be joined:

-for tho' the plea is the same, the Judgment is different: nor can case arising ex delicto even be joined with case ex contractu, as Trover & assumption: for tho' the judgments are the same, the Pleas & grounds of action are ^{diff.} the same. 4 Bac. 11. 1 Vent. 366. Jenk 211. Ray 233. 2 Wils 34. 2 Burr. 1114. 2 Lev 101. 1 Sid 244. Carth 199. 5 Mod 90. 322. 1 Chy 199.)

In no case whatever can tort of any kind be joined with contract. Salk. 10. 1 Bac. 30.) Nor can debt & account be joined tho' the Judgment is the same, and both founded in contract: for the plead^g & proceedings are entirely different: indeed the structure of the action of account is so peculiar that it is doubtful whether it can be joined with any thing else. (1 Bac 21. 4 ib 11. 1 Mod 42.)

The distinctions then appear to be 1. where the Judgment & gen^l issue are the same, there may always be a joinder: the parties being the same & suing & being sued in the same right: 2^d, in some cases they may be joined tho' the pleas are different, if the Judgment be the same: this last is but a gen^l rule. 3^d. on the other hand when the judgments are different & a fortiori when the Judgment & gen^l issue are both diff^s, a joinder is never allowed. —

The effect of a Misjoinder is as great as that of any defect in plead^g. can be: it vitiates the declaration entirely: the Def^t may demur or arrest judgment after verdict, or bring a writ of error after ~~judgment~~ judgment. 1 HBl. 108. Salk 10. Carth 438. 3 Lev 99.) Nor there can be but one final Judgment, & neither of the two kinds are proper for all the diff^s causes of action.

Misjoinder of actions is very different from duplicity in a declaration, tho' they are often confounded. Misjoinder consists in improperly joining diff^s causes of action to support distinct substantive rights of recovery: as bringing Trespass & Debt & claiming a recovery for both.

Duplicity consists in joining different grounds of action in one Count to enforce one entire right of recovery: thus if in an action upon a promise Plff sh^d introduce allegations of fraud in Def^t, this would be duplicity.

A Declaration in Trespass charging Def^t with breaking Plff's house & destroying his goods and beating his servant, "per quod servitium amisit" is good - tho' the "per quod" sounds in case: for the breaking is only mere

matter of aggravation & the damage consequential 4 Bac 12. Carth 113. Sta 93. 2d 2.

2 Wils 313. 3 ib 20. 3 T.R. 292. 1 H. Bl. 555. 2 T.R. 167. 5 Bac 197. As to per quod vid. Lick 97. ^{Chy 178. 97.} ^{Ep. d. 642.}
 This is in fact no joinder of actions, & the Plff ought here to recover as well for the breaking as the beating, and if the per quod were omitted, the declaration would be good, tho' Plff would not recover for the beating of his servants.
 2 Tal K 642. Carth 113. 2 Wils 313. 3 ib 20. 2 T.R. 167. 3 do 292. 1 H. Bl. 555.)

Where several distinct actions are brought by the same persons in the same character for several causes of the same nature, the court may compel a joinder or consolidation of them in the same ^{decl.} ^{action}: as if a holding 10 nites of land agt B. brings a separate action on each; the court will unite them so as to have but one action pending for the whole; this is a discretionary power; the object of which is to save Dept costs & trouble. And Plff will be compelled to pay costs, he being guilty of vexation. (2 T.R. 639. 4 Bac 11. Carth 299. 2 Sta. 1149. 1178. 1 Chy 196. Comb. 244.)

If it appear that there are different defences to the diff causes of action the court will not order a consolidation: for if they were all united, it would create a great confusion. Where a consolidation is ordered by court, Plff is compelled to pay costs of application, for he created the difficulty. (1 Chy 196.)

It has been holden that when a declaration has been demurred to for misjoinder of counts, Plff cannot enter a "nolle prosequi" as to one and leave the other remaining: tho' he may amend by striking out one (2 T.R. 347. 360. 1 H. Bl 103.) - for he may not by his own act defeat the effect of the demurrer. He may enter "nolle pro." before demurrer. (1 Saund 255.) And it seems by the latest opinions that he may enter one, and amend by striking out even after demurrer. (1 Bos. & P. 157. 2 ib 77.)

In Connecticut the com. Law distinctions between judgments in civil actions does not exist, but the rules as to Misjoinder are the same as in Eng.

It is said to have been determined here, that the improper joinder of causes of action, tho' ill on demurrer is mended by verdict: but this will be overruled if it ever was so decided.

Miscellaneous Rules,

The declaration must always agree with the writ: for it is the writ wh. authorises all the subsequent proceedings. If the declaration departs from

24. if the writ is abandoned & Plff's foundation lost; thus, if the writ, entitled an action Trespass & the declaration sound in case of debt, the variance is fatal (4 Bac 12-13. Doct & Lt. 84. Co. Cas 325. Holt. 180.)

Those facts which constitute the gist of the action must in general be expressed & positively alleged, not by way of recital or inference: thus alleging the main fact or grievance under a "whereas" is bad: for no direct issue can be found upon it. (2 Salk 636. Co. Cas 361. Sta. 621.)

It was formerly holden that such pleading was bad even after verdict (Bac. Pleas 355. Shaw 631. 622.) But it has been decided in Mass. (correctly) that such a mistake is aided by verdict (2 Mas R. 358.) As to general rule vide 4 Bac 2. 22. 97. 1 Ambl. 383. 5 Comb. 75. 2 Lev 265. Co. Cas 361. 2 Salk 636. 1 Mass. 96. Esp. d. 316. 5 Bac 191. 2 Sta. 621. 2 Wils. 203. 106977.) Qu? whether it would be ill at any stage; demb. defect in statement only. It would undoubtedly be ill on special demurrer. -

Allegations under a "scilicet" be when not repugnant, are sufficiently direct: as that Deft promised to pay Plff a certain sum of money "scilicet" one hundred dollars: for this amounts to an express avowment. When it is repugnant it is ill only on special demurrer. (2 Wils. 205. 1 Samsd 169. 2 ib 291. 1 Sta 232. 415. Lev 49. Co. Cas 619. 20.)

The rule requiring the gist of the action to be positively alleged, holds, I conceive, as to such facts only as are directly traversable by plea, however essential they may be: for the great reason of the rule is that a direct & proper issue may be taken and found: thus possession in Trespass or consideration in ass may be laid under a "whereas" tho' of the gist of the action; for these allegations are never directly traversable, but are to be denied by the general issue. (4 Bac 13. 19. 22-3. 106077. Com. d. 208. 4 Co. 18. Pleas. ass. 10. Samsd 169. 10 Co 177.)

Nor does it hold of mere matter of inducement: indeed it is unlayalike to allege such matter positively: it is not traversable, nor of the gist of the action. (4 Bac 13. Poph 177. 2 Geo 70. 1 Chy 294. Lawes 71. 2. 118.)

If a declaration good in part & in part ill be demurred to, the Plff may recover on the part which is good, if that part contains a sufficient cause of action: this qualification tho' not generally laid down in the

book, is obviously indispensable: thus if one declares on two bonds, and it ²⁵
appears from his own shewing, that one of them is not due, and his de-
claration is demurred to, he shall have judgment for the one that is due:
"utile per inutile non vitiatur" 4 Bac 256. Co. Dec 104. Hyl 78. Roll 78. 10 Co 115.

The last rule is general when there are two or more counts, one of which
is good and the other bad; as two counts in slander, in one of which the
words laid are actionable, in the other not: for there is of course a good cause
of action. Com. D. Pl. C 32. E 36. F 23. 11 Co 55. b. 1 Saund 285. b.)

But if in this case a general verdict be found for Plff with the entire
damages on both counts, judgment will be arrested and a venie de novo
awarded; for aught that appears the jury may have assessed part or
all the damages upon the bad count. Judgment would be arrested
not for any fault in the declaration, for having one good count it is
good but for in verdict. (2 Bac 7. 4 ib 372. Bull N. P. 8. 10 Co 130.
3 Wil, 197. ib 171. Palk 387. 2 Burr 985. 2 H. Bl 318. Tra 1099. 13. R 508. Ex. d. 316.)

This rule does not hold in criminal cases where there is a general
verdict of guilty: for here the court not the jury award the punish-
ment and they will award it on the good count only.

In Conn. the rule has been exploded and the decision seems to have
been founded on a random observation of Lord Mansfield's. (2 Burr.)

But if the jury assess several damages, Plff may have judgment
for what is assessed on the good count, and tho' the verdict is genl,
yet if the amount of the demand in such count appears on the
record, he may still have judgment on the good one: as in the case
of two bonds before mentioned (1 Saund 174. Co. El 328. 1 Bulst 37. Co. Dec 178. -

If all the words in an action of slander are in one count, some
being actionable & some not, the count is good and judgment may be
had on the general verdict (1 Saund 174. a. 1 Roll 57. Co. El 328. 78. 1 Bulst. 37.

When the declaration is good in part and ill in part, and the
good part does not contain a complete cause of action, the effect must
be the same as if it were ill in every part; & this E. G. conceives must
be always the case, when there is but one individual ground of claim
and that be ill laid or defective in any part; for then the declaration

does not shew any complete right of recovery. (5 Bac 26.) e.g. declaration in ass't. promise well laid, consideration not so. -

Of the Pleadings which follow the Declaration:

I Dilatory Pleas. These pleas are called dilatory because they were used formerly without any foundation in truth, merely for delay. (3 Bl. 302-3.) in consequence of this practice the Stat 4 & 5 Ann. required every dilatory plea to be accompanied with an affidavit of its truth, & of some matter to induce the Court to believe it. In Eng^d then, no dilatory plea is admissible without such affidavit. (4 Bac 35. 3 Bl 303. 3 Nils 57.)

In Conn. we have no such Stat & feel no inconvenience for the want of it: for our genl law requires that every dilatory plea be given in on the first day of Court & that they be always first tried. Dilatory pleas have always been divided into 3 kinds,

I To the jurisdiction of the Court: for this there are several grounds, as that the Deft has some privilege which exempts him from being sued in that Court where the action is brought: thus in Eng^d that the Deft sued in the Court of R. B. is an attorney in the Court of Com. pleas. Another cause is, in Courts of limited jurisdiction, that the cause of action arose out of their limits: thus in ass't before a city court it is a good plea that the promise was not made in the city. (2 Buls 207. 12 R 544. 4 Bac 36. Cant. 11.)

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The privilege of att'y holds only in actions brought ag't them in their own right or in individual capacity and does not hold when they are sued as representatives of others: as in case of being an ex'r: for he can have no privilege which Testator had not. Nor can an Attorney plead his privilege when he is co-defendant with one not privileged: for he cannot oust the jurisdiction of the Court as to another person. So also this plea cannot be made where his own Court has no cognizance of the subject-matter of the suit: as where an Attorney in R. B. is sued in a real action before the Com. pleas. (4 Bac 36. 7. or 136. 7. Cro. Car 585. 2 Salk 2. Hob 177.)

Another ground for this plea is that the Court has not jurisdiction of the subject-matter: but here the plea tho' it must be always effectual is never necessary. Tho' the Court should proceed to judgment, the proceedings are "coram non iudice" & strictly void (17 R. 157.)

Advantage may be taken of the defect in any stage of the proceedings, or the 27
Court may dismiss the suit *ex officio* without any plea. (1 East 362. 4 Bac 35:
1 Vent 333. 10 Co. 86. a. with title False Imprisonment) :- thus if a real action were
brought in R.B. or an indictment in Com. pleas, the want of jurisdiction
need not be pleaded; the Court will *ex officio* take notice of it. —

That the cause of the action arose in a foreign country is no
objection in transitory actions when the jurisdiction of the Court is general;
But in local actions the objection is fatal, if it were only in another Id. Ray
County. (1 Bac 34. Corp 161. 175. 181. 2 H. Bl. 145. 161. 2. 1 T. R. 503. Tit. 1440. 1 H. Bl. 146. 1032)

Under the last rule the distinction between local & transitory
actions becomes very important: the easiest method of pointing out this
distinction will be to mention those which are local, the rest being
transitory (1 Chy 271 to 279.)

I. When the Judgment is to be in rem the action is always & necessarily
local: i.e. when the Judgment is to act upon the subject of the suit & not on
Def't person or chattels: hence all real & mixed actions are local. (ib.)

II. All Criminal causes are local; indeed criminal law is in all
cases local & hence Courts in one state cannot take notice of the penal
Laws of another. But personal actions on penal statutes which are
civil are not local.

III. When the subject is local tho' the thing to be recovered is not
so: as in *Tresp. qu. cl. p.* the action must be brought in same county
where land lies, tho' the Judgment does not act in rem, being for the
recovery of damages. So an action of debt or covenant broken against the
assignee of a lease is local; for the subject of a lease is local & as a^{gt} assignee
runs with the land (2 East 484. Cath 133. 1 Saund 241. b. 1 Chy 271. 4 T. R. 503.)

But as a^{gt} the original lessee the action of debt or covenant broken is
not local; the contract as to him is personal (2 East 579. 1 Saund 241. b. 7 Co. 2. a.)

The plea to the jurisdiction of the Court is regularly the first in
order of all the pleadings on the part of the Def't: for the exception, when
necessary to be taken by a plea is waived by any other plea. Unless in-
deed the Court has no cognisance of the subject matter of the suit; for
then Def't's not pleading cannot give them the cognisance, and therefore

will not take away a right to make exceptions afterwards (4 Bac 728. 35. Co. Litt 127)

The plea to the Jurisdiction must by the com. Law be signed by the party himself, & not by his Attorney: for the Atty is an officer of the court and a plea signed by him is supposed to be signed by a consent of the court & asking leave acknowledges Jurisdiction which is the very thing denied (4 Bac 35. 28. 5 Mod 146. 1 Chy 431. 2.) But this is very subtle reasoning: the practice has always been for the Atty to sign this as well as other pleas.

But the objections can not be thus waived when the suit is "coram non iudice" as when the court have no cognizance of the subject-matter: as in case of a real action in R.B. or Eccobut here before single Justice; This plea concludes to the cognizance of the court whether it shall have further cognizance of the suit. (3 Bl. 303. 4 Bac 35. 5 Mod 145-6. Earth 263. Talk 298. Lawes 109. 1 Chy 427. 450.)

In Com. It has been the practice to allow costs to Deft when an action is dismissed on a plea to the Jurisdiction; this I was never done when the Court dismissed the suit ex officio without a plea: the reason of this practice is not discernible: the Court shd be confined to the single question of Jurisdiction: if they can render costs to Deft, then also they can render damages to Plff, but this presupposes Jurisdiction. It is said that the allowance of costs in this case is intended to prevent a suit by Deft: but this cannot be: the Deft has a right to an ass't of damages by the Jury: the truth is the practice cannot be vindicated.

II. The second class of dilatory pleas are pleas to the disability of the Plff. (1 Chy 434-38.) The first is Outlawry not known in our practice. Outlawry till reversed a pardon obtained disqualified Plff to proceed in any action, for he is not "legalis homo". He can enforce no claim in a Court of Justice - he is out of the protection of the Law. (1 Bac 2. 316. 768. 2. 4 T.R. 35. Litt sec. 197. Co. Litt 128. 3 Bl. R. 961.)

If the incapacity exists when the cause of action accrues it destroys the suit entirely: if not, it does not strictly abate the writ in toto, but operates only as a temporary impediment, which continues till reversal or pardon & then Deft must plead to same writ. (4 Bac 35. Lawes 162. 316.)

But the disability of outlawry extends only to such suits as

Poff begins in his own right, and not to those which he brings in a representative capacity. (3 Bac 761. 1 Inst. 128. a.) 29

But an outlaw may like any other person be a deft, for this is to his prejudice: the disability was intended to deprive him of a right, not to furnish him with an immunity. (3 Bac 761. 1 Sid 60. Joy 1.)

Outlawry is always pleadable as a dilatory plea and sometimes in bar: thus when cause of action is forfeited by outlawry it is pleadable in bar: and if the outlaw is a felon it is pleadable in bar of all actions concerning his goods and chattels or tenements, they being forfeited. (1 Bac 14. 3d 161. 5th 109. 1 Co. Litt 29. 1286. Lawes 38. 104.)

But when the cause of action is not forfeitable, it can only be pleaded as a dilatory plea: as where damages are merely presumptive as in ass. & Battery, Slander, &c. - So when the action concerns his goods and lands when they are not forfeited by outlawry, it is pleaded only to his personal disability (3 Bac 761. a. 2 Dyer 237. 1 Inst 128.)

The second of Excommunication: - with this we have less concern than with outlawry: the rules are of very little use here. Excomⁿ disables Poff from suing either in his own right or as Ex, Adm^r &c for he cannot dispose of the goods of the deceased in prior uxor (1 Bac 32. 4th 26. 1 Inst 133 4. 1 Roll 88.)

This does not abate the suit, but Dft is discharged from answering to the suit sine die, liable however to be summoned again on Poff's absoluteion.

The only good answer to this plea is absoluteion. (4 Bac 36. 2d 320. 8 Co. 96. 1 Inst. 133.)

The third is Alienage. Who are alienated by the Eng^l Laws is of no great moment here - the good rule of Com. Law is that all persons born in a foreign sovereign state are aliens (3 Bl 346. 572. 4 T. R. 308.)

By Stat of U. States Children of citizens tho' born abroad have the rights of natural born citizens i.e. general rights: there are certain offices which they cannot enjoy. So also persons naturalised under our constitution & laws, and their children if under age at the time of the naturalisation of their parents and resident in U. States. vid 6 Stat. 79.)

An alien friend if not naturalised or made a citizen in Eng^l (for here we have no such proceedings) can maintain no action real or mixed; for he cannot hold real estate & of course cannot sue for them: but he may

maintain personal actions as well as a natural born citizen (Esp 437.9. Corp 171.
3 Bl 384. Kirby 413. 3 Bac 4. 83. 4. 4 lb 86. 1 lb 80. 2 H. Bl. 162. Sta 1382.)

Ed. Engr. a
Alien

The rule as to right of action depends on right of property: the rule as to disability to hold real estate is waived by the local laws of some of the U.S.

An alien friend being a Merchant may hold a lease of a house for the convenience of Commerce, & consequent may have an action to recover for the term: this is the only exception at Com. Law (1 Bac, Alien. C. 180 174. 19th 38.)

It is a genl rule that an alien enemy can maintain no action: as a prisoner of War &c. (Sta 1082. 4 Bac 36. 83. 1 lb 127. 1 B. 5 P. 162. 6 T. R. 23. 49.)

But a suit will lie on a ransom bill in favor of an alien enemy in the courts of the country to which the captured party belongs. This rule holds even if the captor with the hostage on board is afterwards taken. This is the rule of the Law of nations (Darg. 619. 25. 1 Bl. 561. 3. 31st Nov. 1734.)

This question is cognisable in the admiralty or prize courts only. (Marsh 434) Such an action was once maintained in R. B. but it is now settled, that cognisance is confined to the Prize courts. (vide Contracts)

6 T. R. 23.

But the action cannot be sustained until the war is ended (Marsh 432.) Now By Stat 22. Geo 3 ransom Contracts by Eng. subjects are prohibited. 433

An alien enemy residing here under a license or protection, or who came under a safe conduct from the Government may maintain personal actions: for this brings him within the benefit of the Law so as to assert his rights under it. (Id. Ray 282. Talk 36. 1 Bac 4. 84. 8 T. R. 166.)

The question whether an alien enemy not thus protected can like an outlaw sue in right of another (as 44.) is yet unsettled. (1 Bac 84. a. Co. 11. 142.) J. G. thinks not. If he can must he not be at liberty to communicate with his counsel & thus to give and receive instructions and keep up personal intercourse with our citizens? (15. Johns.)

An alien friend may be an Est. and hold leases, tho' he is not a Merchant. and of course may sue for them. (Co. Cas 5 ad. 1 Bac 84.)

On a plea of alien enemy, the onus probandi is on Def: if he pleads that Plff is an alien enemy he must shew it: he cannot call on the Plff to shew that he is not (Sta 1082. 4 Bac Pleas F. 36.)

The fourth species of dilatory pleas to the Plff is Popish

Recusancy: of this I have nothing to say; there are some others, which I shall briefly 31
mention as Ramanian, Entering into Religion, & Attainder of Treason or
Felony (3 Bl. 301. 4 Id. 380. 4 Bac 36.) With the three first of these we have
nothing to do. Attainder of treason or felony may exist in some of the U.S.
By the constitution of the U.S. the legal effect of attainder is confined to
the life of the offender: the disability does not extend to his heirs or pre-
vent them from inheriting the Estate. vid art 3. Sec 3. —)

Fifth, Coveture of Pff is pleaded as a disability when a feme co-
vert sues without her husband, but not if the husband be joined, & the
case may be proper: for the disability cannot then be pleaded as such.
4 Bac 39. 1 Inst 132. 1 Bl 443. 1 Com 9. 3 T.R. 631. Lanes 105.)

Coveture cannot be pleaded to the action, but only as a dilatory
plea: — for the objection is not that Pff has no right, but that she is inca-
pable of suing for it alone — It goes only to the manner in which the remedy
is sought (4 Bac 44. Carth 1245. 3 T.R. 631.)

Whatever is pleaded by way of dilatory plea cannot be pleaded
to the action or in any subsequent stage of the pleadings: for it is un-
reasonable that deft should defeat the suit in a subsequent stage by an
exception going to the merits, and by which he might have destroyed
it in limine (6 T.R. 766. vid. Post)

If a feme sole marry pendente lite, her coveture may be
pleaded to her disability (4 Bac 39. 1 Bl 316.) & plea may be filed after rule is out.

But a recent Stat of Conn. has varied this rule of the com. law: by this
Stat the suit does not abate, but the husband must appear & suggest
the marriage on record & proceed in the suit without the wife (Stat Conn 577)

Sixth, Infancy: that pff is an infant suing without Guardian
or prochein ami is pleadable to his disability (3 Bac 148. 9. 3 Bl 504. Palm 296)
The objection that pff is not responsible for costs is sufficient — and Judgment
agt him is at Com. Law erroneous, & *errata coram vobis* "his" — it is error in
fact which must be averred (2 Sand 213n. 3 Bac 190 n. Co. 2l. 4. 424. Caff 123.)
There is a solitary case (Co. 2l 572) that if Judgment be for him, it is not error.

By Stat 2l. Dacl. Chap. 13. Sec 2. If the Judgment is for him on a verdict,
it is not error unless the disability is pleaded. (Conn. S. P. E. C. 2 Sand 212.
Co. 2l 580. 3 Bac 149. 1 Id 93.)

To by Stat 4 Anne Ch. 16. sec 2. & So also if judgment by confession or nil
dict be for the infant, it is not erroneous.

2 Conn. R

357.

In Conn. courts of Error have lately determined that this
rule holds in a complaint by a female infant on Stat. of Bastardy.

The seventh kind of plea is Nonentity, i.e. that the person
named as plff is not in esse (Lawes 104. 3 Bl 301. Com. Di. Abat. E. 1647.)
as where the action is brought in the name of a deceased or fictitious person.

Whether this would be a good plea in bar is not settled: It seems to
me that there is one rule which is decisive of this question; that if judg-
ment issues for Plff who is not in esse, it is erroneous & a writ of coram
vobis will issue (1 B. & P. 44.) It surely would - for there certainly
would be no cause of action in favor of Plff on record. -

In. as to Ejectment. fictitious plff not pleadable. -

Pleas to the disability conclude to the person by praying
judgment if the said A be Plff. (3 Bl 303. Lawes 164.)

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875-

If the disability is temporary this plea is voided, that plff may re-
main without day, until his disability is removed, as in outlawry (Lawes 103-7)

III. The third class of dilatory pleas are pleas in abate-
ment proper: Abatement in Law denotes prostration or demolition (p. abetter)
as in case of nuisance: to abate a writ then, is to destroy it. (4 Bac 35. Goldt 134. 2.)

Pleas in abatement generally extend to the writ only & not to the count or
pleadings: any defect in the latter is regularly reached by a demurrer (3.
Bl 301. 3. 1 Bac 15. Talk 298. Carth 174. 3 Lev 364. 1.)

In conn. they consist of that part of the record which precedes the
statement of the cause of action: this statement (beginning after the
words "in a plea &c whereupon the Plff &c") constitutes the declaration:
the date is common to both; the signing, recognisance & certificate of
duty paid belong to the writ. The distinction is this; that part of the
record which is the act of the court or Magistrate signing it, constitutes
the writ: the allegations of the Plff compose the declaration. -

The general rule that pleas in abatement do not reach the
count is not universal: tho' it is universally true that every plea that
goes to the writ only is a plea in abatement, but not i converso that plea

in abatement goes only to the writ - in some case the plea in abatement does reach 33.
the court (3 Bl 624. 4 ib 850. 5 Mod 830. 44. Lawes 108. 3 Bos & P. 647.)

Hence Misnomer in the declaration when there is none in the writ: so variance between the writ and declaration, or a variance between an instrument & the description of it in the declaration may all be pleaded in abatement. (Salk 657. Con. Di. act. n. 12. abatement 9. 1. 1 Bos & P. 647.)

The Court may in its discretion refuse oyer of the writ for this purpose & then the variation cannot be pleaded in abatement between an instrument & the description of it in the declaration. The practice is to object to its admission as evidence, & a Deft may pray oyer of the instrument & recite verbatim on the record and demur. In Court it almost the universal practice to plead it in abatement: this may be done at Con. Law.

In pleas in abatement great precision is required, the Law does not favour them - they are odious in its sight, and the least inaccuracy is fatal. Id Coke says they must be certain to a certain intent in every particular - Deft must even anticipate the possible answer of Plff. (33 R. 185. 6. 5 ib 487. 8 ib 176. 1 Com. D. ab. t. 11. Lawes 55. 6. 107. 1 Mod 208. Co. Dac 82. 2 H. Bl. 530. 1 Chy 444. 5.) The same precision is required in Estoppel. -

A Deft who pleads in abatement must in general 1. give plff a better writ: (1 Chy 445.) or he must so plead as to enable him to supply the defect or avoid the mistake on which the plea is founded in a subsequent writ: as in a plea of misnomer he must state his true name and in a subsequent suit it is conclusive agt him.

Cause of Abatement may be either intrinsic or dehors: as misnomer & want of addition. Misnomer of Deft is a ground of Abatement whether the mistake be in the writ or in the declaration (3 Bos 642 4 ib 38. Salk 7. 3 Bl 302. 1 Sid 247. 3 East 167.)

So of the omission of defts addition: this is the description of his trade estate or degree & place of abode (Lawes 106. Conth 14. 6 Mod. 105. Co. 26 371.)

These particulars must by stat Hen. 5. be added in England to Defts name by way of description, and for the sake of certainty in order to distinguish him from others of the same name (3 Bos 613. 20. 3 Bl 309. Conth 14. 6 Mod 105.)

By the present English practise of the writ will not be granted to let
 1 Samd 318. in the exception (Chy 440. Lawes 97.) Addition of Deft in the declaration
 is not therefore necessary & want of it is not pleadable in any case. (7 Esb 363)
 n. 3.

In giving deft his addition the Law was never very strict: It was
 sufft to state his degree or mystery & mention his present or late abode.

The stat of addition extends only to personal actions, appeals & indict-
 ments & not to real actions: because in them constabat de persona from the
 possession of deft: naming him by his proper name is sufft to identify
 his person (5 Bac 618. 6 Mod 83. & 85) pari ratione it does not extend to Eject^{mt} or Waste.

At com Law neither want of addition nor misnomer were
 pleadable in an indictment for Treason or Felony: for constabat de persona
 from prisoner's appearance in court - but the rule did not apply to
 cases of mere misnomer, for there the deft may appear by Attorney:
 & now stat 1 Hen 8 has reversed the rule (4 Bac 38. Cro. Car 114. 1 Sid 40.)
 But the plea can be really be of no use to the prisoner: for in making
 it he must give his real name & the court will of course detain him
 until another indictment is found (1 Hawk. 243. 2 & 176. 238.)

In civil actions deft gains something by pleading in abatement: he
 defeats the suit entirely & at least obtains a bill of costs: mistake in the
 addition is cause of abatement as Esq. for Knight &c. (2 Bl 302. Comb 65. 2 Ld Ray 104.)

But this will almost seem virtually abolished by the rule of Court
 before referred to. In Com. the only description referred to necessary
 that of Deft's place of abode. -

But when the addition is matter of inducement it must be given him:
 as when one is sued in an official or representative capacity: thus if deft
 is sued as shff, constable, &c. & he is the addition must be given him, what
 Carth 309. matter of inducement but to know how his liability accrued. (3 Bac 620. 4 & 39. 2 Paul 24.)

In this case the capacity in which deft is sued is of the essence of his lia-
 bility: when however an addition of the last kind is unnecessary, it is mere
 surplusage & tho it does no good, a mistake in it does no harm. Thus if A
 sued for a Tresp committed by himself, is wrongly described as heri at Law
 of J. (3 Bac 621. Cro. El 333.)

The misnomer or want of addition as to one of two defts is not plead

able by the other: for the right of exception is personal: the latter cannot in general take any advantage of it or even except to it: the former may if he pleases admit himself to be the person named & to be rightly named & described in the writ, and the other cannot object to such admission (3 Bac 618.) 4th 38.

If the misnomer or want of addition as to one deft create a variance, then indeed the other may take advantage of it: thus if A & B. are sued on a bond & B is misnamed or receives a wrong addition, A may object to the admission of the bond in evidence, or he may waive over, recite it verbatim on the record & demur. (ante) The rule holds as to indictments or other criminal process where two or more are prosecuted. (3 Bac 619)

It has been made a question whether if a writ abate as to one of several defendants, it abates in toto: the latter opinion seems to be correct. But the decisions seem to have omitted entirely, what appears to be the only true criterion, i.e. whether the cause of action is joint or joint and several (vid Carth 96. 1 Com. 79. 2 Co 159. b. 3 Bac 625. 4 ib 45.)

2d. If cause of action is joint only and the writ abate as to one deft, must it not abate as to the other? or is the first excused, to leave the other to plead the non-jurisdiction? 2d Com. Law before that Hen. 5, the dignity or degree of a party, if as high as that of a knight must have been added - otherwise not. (1 Com 15. 3 Bac 617. 2 Roll 467. Com 187. Salk 511.)

A deft who pleads misnomer, want of, or mistake in the addition must give the pff a better writ - i.e. must furnish him with the means of making a better one - hence must set forth his right name & addition at the time of issuing the writ, otherwise the plea will - he must even deny that he was known or called by the name in which he was sued. - (3 Bac 624. 8 T. R. 515. Lillie 534. Com. d. Abt. f. 12. Willes 534.) Indeed the rule requiring deft to give a better writ holds as to pleas in abatement generally (Lawes 39. 103. 4 Ld R. 1178. Com. d. abt. Inst 11. III. Ld. R. 118.)

The object of the rule is that pff may be able to avoid future mistakes of the same kind & that justice may not be delayed by captious exceptions. -

The Deft in this plea must state that he was known and called by such a name at the writ's issuing, & he must traverse that he was known & called by name in which he was sued. - 3 Bac 624. Salk 67.

If the Deft admits himself by his manner of pleading to be the person named, or rather to be rightly named, his plea is ill: as if being sued by the name of C. D. he pleads by saying "I the said C. D. comes & defends." (Lames 92. 5 T. R. 487. 1 Shaw 394. 2 Hann 209. c. Carth 309. 2 Chy 417. Comb 110.)

If Misnomer and want of addition as such, no advantage can be taken but by plea in abatement: the exception is waived by pleading to the action, for the Deft cannot as a general rule assign matter which might have been pleaded in abatement, in any other way. (1 Bac 88. 3 B 153. 623-4. 1 Roll 750. 6 T. R. 466. Carth 124. Salk 2. Comb 188. 2 H. Bl. 267.)

It is laid down in the books that if one executes a specialty by a wrong surname, he must be sued by that name with an alias, & execution must follow it. (Stra. 1218. 1 Bulst. 210. 3 Bac 617. Dy 272.) This will be good pleading, but I. G. conceives the better way would be to bring the suit in his right name & aver that he executed the instrument in a fictitious one, and this is the more common form. —

It is no error on face of the writ, that there is a misnomer: — the court cannot know the fact & it can be made known only by plea in abatement. If recognisance of bail is taken for him by the name by which he is sued, he is estopped to plead misnomer, tho' he is not a party to the recognisance. — (2 N. R. 453. Will 461. Salk 8.) It is an admission that he is sued by the right name. —

If one executes specially by a wrong ^{due} name, it is said that he must be sued by the wrong name (unless.)

There is an essential difference between a mistake in the Christian and Surname of a party: the former is said to be fatal in pleadings or in instruments. (3 Bac 616. 22. 1 Inst 3. 5 Co 43. Day 276. Ro. 21. 987. Ro Jac 588.) Thus if J. S. executes a bond by name of T. S. it is said that there can be no recovery: that the deft cannot be sued by his right name with an averment that he executed by a wrong name, nor can his true name come in under an alias. I. qu. (1 Chy 440. Stra 1218.) This rule is too broad: if the action is on a parol contract or for a Tort, the mistake is fatal to the writ, even if his true name be added under an alias: but if on a specialty, deft may be sued by the name in which he executed it,

and to a plea of misnomer plff may reply that deft was known as well by 37
the wrong as the right name, & the deed estops deft to deny it: but if he
be sued by the right name only, or by that & the wrong name under
an alias the mistake is fatal. (same. auth.) In the former case proce-
dure is supposed: in the two latter two christian names. —

In parol contracts & Torts plff has only to sue deft by his right
name (Wils 554 Cro. El. 897. n. 3 Bac 616. n.) there can be no need of an
alias in such case, for there can be no variance. —

The writ should always describe all the debts by their right
names, except in the case of a corporation. — Giving the firm of a part-
nership as "S. S. & Co" seems not to be sufft: for such a description may
not contain the name of one of the partners — the name of the partner- 3 Pl. R
ship is altogether arbitrary; it is therefore necessary to give the name 578
of each deft individually & then the firm comes in by way of description. — Leach 240 —

But Corporations must sue & be sued by their corporate name; giving
the name of the individuals comprising the corporation is not sufft 1 Pl. C.
for they are not known in the description of the corporation. (Leach 244.) 2d. cap. 12

A deft who is misnamed in a writ, never need for his own
safety take advantage of it: for if afterwards sued for the same cause of
action by his right name, he may plead the judgment in the former
suit in bar, with an averment that he is the same person. (3 Bac 25. 4th 32.)

Misnomer of plff may also be pleaded in abatement (1 Com. 114.) And
Replication that plff was known as well by the name by which he
sues as by the other is good (1 East 542.) — But a wrong addition of
the description of plff cannot be pleaded in abatement except as at Com.
Law: for the Stat. Hen. 5. does not extend to plff. there being no mistake
supposed as to Plff's identity: If then his dignity be under that of a
Knight it need not be added. (3 Bac 617. 13. 1 Com. 15. 6 Mod 25. 1 Show 392.)

In Conn. the place of residence is the only necessary addition: a
mistake in that is a cause of Abatement: because in transitory actions the
place of residence of the parties regularly affects the Jurisdiction. In?
does the rule on principle extend to local actions?

22 Coverture of a Sole Deft is good cause of Abatement.

for she is not liable to be sued without her husband (4 Bac 37. 1 Inst 132. 1 Sid 440.)

But if a feme sole deft. marries *pendente lite* the writ will not abate: she cannot by her own act defeat a suit rightfully commenced agt her. (1 Bac 9. 10. 4 ib 40. Ro Bac 323. Esp. d. 228. Sta 810. 1d Ray 187257.)

If a feme, sole deft. would avail herself of her coverture, she must regularly plead it in abatement (Litch 24. 2 Bac 29. 39. 1 Chy 427. 5 D. R 626.) Otherwise she admits herself to be rightfully sued as a sole deft. - and she must plead in person or by Attorney; for she cannot appoint one (2 Chy 415. 24. 2 Saund 209. 1 Chy 749.)

But if she does not so plead, her husband may plead it in bar or in any other stage of the proceedings: as he may even reverse a judgment agt her by writ of *error coram vobis*, assigning the coverture as an error in fact. (4 Bac 10. 39. 1 Roll. R 53. 3 T R 131. Salk. 400. vid. post -

N. B. a writ of error is called a *coram vobis* when brought before the same court which tried the case first; it is always grounded on error in fact - for the right of the husband cannot be barr'd by the wife's own thing to plead in abatement. This writ of error must be brought by the Husband & wife together, for the husband cannot bring it alone because it is in right of his wife; she cannot of course. (3 Esp. Cas. 16. 19.)

If the wife be sued on contr. made during coverture, it may be given in evidence under the general issue; not as a privilege not to be sued alone, but because the contr. is void. (Lawes 105. 1 Chy 440.)

But if a man keeps a whore & holds her out to the world as his wife they may be sued together as husband & wife, & in some cases they may join as plffs (Comb 131. 273. Bac. Baron & feme p. see qn.)

When deft. is an infant and sued without Guardian, it is no cause of Abatement - but the court will allow time to summon in his Guardian if he has one - or they will appoint one ad litem: for the fact may be that he has no Guardian, and if that would abate the suit such infant would be entirely lawless. (1 Inst. 89. 135. 3 Bac 149. 5 Co. 53. b. 2 Bl 247.)

If judgment would go agt him without Guardian it would be cause of error & error *coram vobis* (Ro Bac 640. 2 Bac 218. 9 clo 52. vid. *ante* p. 37.)

If an infant is one of several defts, Judgment agt all is erroneous & may be

reversed in toto. - If an infant has sued as such on an obligation of his ancestor, his infancy should not abate: but the plead. &c. the pleadgs should be suspended until he attains full age 2 East 486. Lawes 105.)

In Com. it is no cause of abatement that Deft's conservator (who is in the nature of a committee of a lunatic at com. law) has not been cited. - reasonable time will be allowed to cite him. (Kilby 174.)

3^d Death of the parties at com. law - As if a sole plff or sole deft die, pendente lite, the suit abates, and of final judgment should be rendered in such case, it would be erroneous either for a against the deceased party, i.e. error in fact. The writ of error would lie by or agt the Exr or Admr in personal actions and I.G. supposes by or agt the heir in a claim real. (1 Inst 139. Com. D. 55. b. Co. El. 892. 10. Co. 134. 1 Bac. 2 d 218. 4 d 218. 1. 3. Carth 338. Ray 59.)

If in a summons agt an Exr or Admr. Shff returns that the original party is alive he may come in & plead in nullo est creatum. (Carth 339.)

So if one of several plffs dies, pendente lite, the writ abates; for by joining in the action they assert a joint right, which by the death of one, is, as a joint right, destroyed; except in personal actions after summons & severance - for after severance the party severed ceases to be a party, and the survivor is the sole plff. There is an exception in real actions, because by the death of ~~one~~ party of several plffs in a real action, the extent of the survivor's right is increased & he must go for the whole; whereas in the writ after summons and severance the case comes within no exception to the general rule and the writ must abate. (1 Bac 7. 8. - b. Co. 26. 10 d 134 d. 1 d 111.)

At com. law if one of several plffs dies after verdict and before judgment the rule was the same and the judgment would be arrested except in the last case (Ray 463.) But it was a general rule even at com. law, that,

If one of several Defts died the suit should not abate: in such case, the plff should suggest the death on the record & proceed agt the survivor (1 Bac 3. 4 d 42. 3 Mod 249. Hard 137. 1 Shaw 186.) - for they, by being sued together do not assert any joint right or any other, nor are they bound to join in defending; and as one may be liable and the other not, the suit may proceed agt one alone on the death of the other if the cause of action survives: but if not, the suit must abate as in the com. law action of conspiracy.

Spiciacy: in this case however if the plff would take out Judgments agt all the original party, it would be invalid in toto. (Carr 449. 1 Com. 56. 7.)

Now by the English Stat 12 Car 2. and 849 Wm. 3^d & by a similar one in Conn. the inconvenience of the abatement by the death of the parties is in a great measure remedied. (Chy 55. 3.)

1. Under these Stat where there are several plffs, & one dies pendente lite, the suit shall not abate, if the cause of action is such as would survive to the survivor: - but not always - as where husband & wife ~~were~~ ^{was} suet in her right & he dies in an action of contract. But in most instances it does not abate - as in a suit by the husband and wife for an injury done to the wife and she dies. - So then if there are several defts and one or more dies, if the cause of action is such as would survive agt the survivor there is no abatement. In either case the death being suggested on the record, the suit proceeds: so
1 Chy 55. even if one dies on each side (1 Com. 545. 4 Bac 42. 2 Mod 15. Stat. Conn. 22. 3.)

2.^d If a sole plff or deft die pendente lite, in a case in which a right of action would survive to the exr or admr, in Conn. the suit does not abate. - in Engl^d to give effect to the will, the death must have happened after some interlocutory judgment: i.e. judgment on which a writ of inquiry of damages was awarded. S. G. does not see reason of qualification, and prefers our practice. (Stat. Conn. 22. 3. 4 Bac 42. or 22. 6 Mod 44. Toll 243.)

If plff die, his exr be suggests his death on the record, & enters his own name as exr &c. to prosecute. If deft die plff or his exr be may have "fieri facias" agt the exr &c to appear & shew cause why the case should not proceed agt him. (10 Auth. Leon 55. Com. D. 54. 5. 4 Bac 22. 3.)

The Conn Stat relates in terms only to actions in the Super. & County Courts, in all the foregoing cases. In practice however, it has been extended to suits before single Magistrates. If there be two plffs to the suit

If there be two plffs to a suit one of whom dies before the other pendente lite, the action probably survives first to the survivor & then to his exr: for at the time of his death he is the sole plff. - So of two defts: on the death of the first the entire remedy is agt the survivor & on his death agt his exr &c.)

Real actions abate in most cases as at Com Law, on the death of the sole plff or deft: for the Stat which keeps alive actions in favor of exr &c

do not extend to real actions nor affect real rights. - But real actions, not *Sp. Co. 223*
by several plffs, or agt several defts are within the Stat^e on the subject, 1 Bac 79. *Car. 26. 892*

It was decided by our Superior Court in 1820. that petitions for new trials are within our Stat^e, tho' the Stat^e were passed before any such petitions were made, & that on the respondent's death *habeas corpus* lies agt his exec as in actions. (Day 180.)

4th Variance is a cause of abatement (4 Bac 44.) By this is meant some diversity between the instrument, contract, or fact alleged & the description of it in the pleading. If the declaration varies from the writ, the variance may be pleaded in abatement - The declaration is said to abate the writ - as if the writ sound in Tresp. & Declaration in case: for the writ is the foundation of all subsequent pleadings, & if the declaration varies from the writ it is ill.

But now by the practice in Eng^d the rule is virtually done away. (4 Bac 8. 43. 4. 1 N. R. 249. 1 Com 37. 4 Geo 5. Lawes 97. 6. T. R. 363.) i.e. by refusing over -

As to the Modern practice it is under a special rule of Court. (Lawes 97. 1 Chy 440.)

There is a mode of setting the proceedings aside for irregularity Variance by motion: as in case of a writ agt two in bailable process & declaration agt only one. - (2 N. R. 82. 5 T. R. 720. 1 B 352. 4 East 589. 1 Bos & P 17. 49.)

If the variance is in point of fact only, plea in abatement is necessary, & if the exception be not taken in this way it is waived. But if it be in substance it is fatal - & plea in abatement tho' proper is unnecessary - Judgment may be arrested, or the Court will, ex officio, dismiss the suit - as if plff in his writ demands a debt of \$20. & there's in his declaration that it was only \$10. the error is in substance & fatal: for it is in effect claiming two diff^t debts. (Geo 120. Litch 173. 4 Bac 43. 4. as it is no)

But this last rule it seems is not agreeable to the Modern Eng^l practice: for by the rule of Court they will not grant over of the writ (at supp.). This goes so far as to prevent exceptions on account of formal variance: how far it affects substantial variance. I. G. can't say (2 Wils 394. 4 Mod 276. 6 ib 303. Talk 658. 701. Lawes 17. 105. 1 Chy 440. 1 Saund 318. n. 3. 3 Bos & P. 395. 7 East 385.)

Variance between an instrument sued on, & the description of it in the writ is cause of abatement. (Lawes 106. 6 Co 16. 2 Wils 232. 4 T. R. 314. Com. D. ab. E. 12. 1 B. & P. 87.)

In describing matter of mere Tort there can hardly be any variance: if one declare in Tresp for cutting down 100 trees & prove the cutting of one only he may recover for that (at ant^e.)

If the variance is between the instrument sued upon and the description of it in the declaration, the usual mode in Eng^d is to take advantage of it in evidence under the genl issue, by objecting to the admissibility of the instrument as evidence, and in this way it works a non suit (15 T.R. 656. 4 id 612. 187. 8. 1 Sand 154. a. Plowd 84. 1589. 7.)

In Conn advantage of such variance is generally taken by plea in abatement and this would be good in Eng^d - (Salk 659. a. 57. Com. D. ab. h. action. 6.) But neither of these modes is exclusive, advantage may be taken in 4 ways. 1 By plea in Abatement. 2^d in evidence under the genl issue: (by permitting it to go to the Jury & contending that it proves nothing.) 3^d By objecting to its admission as evidence. 4. By writing it on the record and demurring to the declaration (Com. D. Pl. 2. 3. Hob 18. 2 Wils 339. Buls 215.)

As to this last mode the declaration is good of itself; but the writing when recited becomes part of the declaration & thus makes it inconsistent with itself on demurrer. as if plff shd declare on a bond dated the first day of June which was in fact dated the second. After this is recited on the ~~record~~ it becomes a part of the declaration, so that it is the same thing as if plff had declared on a bond dated on 1st & then gone on himself & stated one of 2^d day.

But it has been once decided in Conn. that demurrer on oyer to the declaration, for such variance is not good. (Kirby 106. 7.)

Misnomer if it works a variance may be taken advantage of under the genl issue. - as if A be sued on a bond in the name of B: But advantage is taken if it not as misnomer but as variance. The bond offered in evidence does not support the declaration - It is a diff^t instrument from that counted upon. (15 T.R. 656. 4 id 612.) The rule is the same where plff counts upon and misrecites a record. -

5. Non Joinder and Misjoinder of Parties, are causes of abatement and are perhaps a more general ground of exceptions than any other, vid. ante.

Plffs.

If one sues alone as sole plff, when another ought to have been joined with him this omission or nonjoinder will abate the suit - as if a bond or contract be executed to A & B. and A sues alone upon it (1 Com. 10. 11. 1 Inst 164. a. 189a. 195b. 198a. Salk 4. 7 T.R. 240. 423. 1 Sand 291. h.)

Roll 294. So if several sue when the right of action is in one or any number less than Holt 72 the whole the misjoinder is pleadable in the same way. (1 Com. 13. Co. El. 143. 1 Leon 315.)

This rule is universal: in some cases also the exception may be taken under the general issue, or upon demurrer, or motion in arrest of judgment; in other cases not: on this subject there has been much apparent confusion in the books, but the rule of discrimination is a simple one - When the objection arising from non-joinder or misjoinder goes in denial of the declaration, advantage may be taken of it, as well under the general issue as by plea in abatement, or in other words, when the objection to the fact on which it is founded that a stranger should have been joined, or that one of the actual parties should not, is inconsistent with any material averment in the declaration, advantage may be taken of it under the genl. issue: for whatever denies any essential part of the declaration goes in support of the genl. issue. - As if an action on contract one sue alone when others should have joined, or of several join, when the right of action is in one only - thus on a bond executed to A & B jointly, if A sues alone, debt may take advantage of it under the genl. issue; he did not promise to pay A alone - But A & B jointly or together. - Bull 152. ^{1d and 152} "271" In this case too he might demur or open. (vid ante) 1 Bos. & P. 45. 2 Str. 220. Perk. ar 205 - The contract proved a shewn or open, is not that which is stated. (Sand 271. f. 271.)

If in an action on cont. it appears on the face of the declaration, or other pleadings of the plff, that another person should have joined him in the suit, the mistake is fatal, and not aided by verdict - It is ill on demurrer or on motion in arrest of judgment. - So of Trover, when the right of action is in one only (1 B. & P. 67. 5 Co 18. c. 1. Esp. d. 324. Sta 1146. 1 Sand 153. 291. f. 291.)

So if A sues on a bond made to himself & B. and describes B as in life when he is dead, the error is incurable. -

But in Torts the rule is otherwise: if one sues as plff when it appears even from his own pleadings, that another should have been joined as plff. advantage may be taken only in abatement. the exception does not contradict the declaration and of course does not support the genl. issue. - Thus if A & B are joint tenants & A alone sues C. in Tresp. qu. d. fr. the declaration is that C. has entered on the land of A - the fact that it was also the land of B. does not deny the decl. - & it will not support the genl. issue: the debt has trespassed on plff's property, tho not on his sole property (6 T. R. 466. 1 Sand 291 f. g. h. Talk 32. 290. Sta 220. 420 1146. Co. El. 574. Esp. d. 143. 5 Co 98. 186. 8th 59. 5 T. R. 649. 5 Bae 185. 5 East 407. R. ar. 205. -

In this case however the Deft may show, under the general issue, the interest of the other party, for the purpose of taking off a moiety of the damages. Reb. 10. 1703

But if two sue in tort when the right is in one only, advantage may be taken of it under the general issue 5 Bae 97. 200. Co. 21 143. (Lacy & others vs Barrie &c. Taif. Co. Sup. Court June 1805.) for here the exception does go in denial of the declaration as in the instance given above. If then A owns land alone and A & B sue C in trespass, tho he has entered on A's land, he has not on that of A & B; this part of the rule holds as well torts as in contracts.

One of two joint owners of a chattel sues for it done in Trover, & Deft does not plead the joinder of the other owner in abatement - the other may afterwards sue alone for his part of the damages. (7 T. R. 249. 12 Ex. d. 116. As if A & B own a house, and A recovers for himself in Trover agt C. this recovery is no bar to B's right. 2 Esp. 586. 622.)

Def't's

If one of two joint debtors is sued alone on Court. he may plead the non-joinder of the other in abatement: if not so pleaded it is waived - unless it appear on the declaration or other pleadings of plff. that there is another debt who ought to have been joined - Thus if A & B are joint debtors and A is sued alone he can plead only in abatement, unless it appears from Plff's pleadings that they were joint - here the fact that B is indebted with A, does not disprove that A is indebted. It is still his debt tho' not his sole debt.

Talk-444. If it does so appear the error is in citable 5 Barr. 2611. 2 Bl. R. 947. 5 T. R. 651.
continued 6. 1327-69. 1 dauid 271. Co. 22 15-2. Co. 22 152. 5 Co. 119. 9 of 110. Corp 832. 2 A. R. 466.

So in actions ex quasi contractu. the non-jurisdiction of a co-defendant if pleaded at all must be pleaded in abatement. It is pleadable in no other way (104 and 291. C. N. 6. T. R. 319. Carth 62. 3. 2 N. R. 365. 5 Bac 15. 185. 6. 192. (Talk 444. contra.) : thus in an action agt a carrier or other bailee, stating the implied contract but charging neglect or breach of trust. (5 T. R. 657. 2 Bl 182.)

But the rule now seems settled that it is not necessary to join all the parties liable in such cases, the gist of the action being Tort (3 East 62. 9. 70. 55 R. 649. 57.) and Tort being several. —

In these cases of non-jointure, debt cannot rely on the joint issue - for it is his deed, promise &c. tho' not his sole deed &c. there is therefore no variance - thus if A & B. execute a bond together and A is sued alone upon it, proof that B

created with him does not disprove that he executed it and therefore does not ⁴⁵
support the general issue (3 Bac 698. 1 East 283. a. 5 Co. 119. 1 Vent 34. 2 Bl. R. 950. Chy 29.
132 B 72.

If several join in contract and one is sued alone, and abates the writ by
pleading the nonjoinder of the other, this one may in the next action plead
nonjoinder of the others - and so every new deft thus discharged by plea in 3 East
abatement may plead in the next action that others still ought to be joined. - 70-1

But if it appear from the declaration or other pleading of plff, that
the deft and another were jointly bound by the contract, & that the other is ^{9 Co. 52.}
living, the nonjoinder of the other is incurable and not aided by verdict (5 Burr 264. -
- for it then appears from his own shewing, that the action is wrongly brought
and therefore the declaration is ~~wrongly brought~~ insufficient. (3 Bac 698.
1 Vent 34. 1 Saund 291. b. 8 c. 9 Co. 52. b. 6 J. R. 369. -)

If two of three joined in several obligations are sued, the mistake
is pleadable in abatement only (1 Saund 291. 1 Chy 30. -

If two are sued in court when one only is liable, advantage may be
taken of it under the general issue - for this A made the court. 44 B 111.
not - the nonjoinder then supports the genl issue (1 East 48. 2 N. R. 452. 2 Day 21. -

If the verdict in this case is found agt one and ~~not~~ for the other, judgment
cannot be rendered agt either - the former may not judgment - for the verdict
negatives the declaration which lays a promise by both. (3 East 62. 3. Carth 361.)
And the rule is the same if the plff is any way barred as to one, as go on
the ground that one only is liable (1 Keble 284.) nor can plff enter a nil
pro as to that one. (5 Esp. Cas. 47.)

But if two are sued in a tort for a wrong done by one of them - the
guilty one must be convicted & the other acquitted & the nonjoinder
is not pleadable in abatement - for in torts there can be no nonjoinder of
defts (11 509. 993. Esp. di. 336. 3 Bac 15. 185. 192. 8 Co 157. 5 T R 649. 1 Saund 291. 3 East 62.

In case of a tort committed by several, one or all or any number of the wrong
doers may be sued: their liability is joint and several, and neither nonjoinder
or nonjoinder is predicable of torts - but to this rule there is one exception, i.e.

Where the right of action arises out of a title to a real estate in both or all
the defts. All must be joined: as, A & B being joint owners of land, are in conse-
quence of their tenure obliged to repair a high way - by their neglect a third

person is injured - here tho' the action sounds in tort, yet all the debts must be joined or there will be good grounds for a plea in abatement. J.G. does not see the principle of the distinction - the reason commonly assigned is, that tort tho' in its nature several, arises in this case from the neglect of a joint duty.

b.7. R. 369 in the Plff. (5 T. R. 657. 1 Saund 291. E. 2 Bl 182. 2 East 574. Com. D. ab. f. b. 1 Chy 70.)

N.B. Non & Misjoinder are the most frequent exceptions made use of as pleas in abatement, and are therefore perhaps the most important. If the principle is well understood, the distinctions are perfectly intelligible. vid. Rule of distinctions ante.)

- b. Pendency of a prior suit for the same cause of action, between the same parties, is a good ground of abatement - for the law abhors multiplicity of suits, and will never permit more than one to be maintained when that will answer the purpose: the rule is intended to prevent the plff from harassing deft needlessly. (1 Bac 13, 4 & 48. 5 Co 61. a. b. Hob 182. 4 S 43 a.)

But to give force to this rule both suits must be of the same kind - at least concurrent and the cause of action must be the same in both - otherwise the rule does not hold: - thus in actions of trespass for taking goods, the pendency of a former one in Trover for the conversion will abate it - they are concurrent.

When goods are tortiously taken and sold, the owner may bring Trespass for taking them, a Trover for converting them (making the taking a conversion per se - or indeb. ass. for the money produced by the sale. - In such a case, the pendency of either of those actions will abate the other. (Mod 418. 559. 5 Co 61. a. 4. & 36. a. Hob 182. 1 Com 49. 50.)

But the pendency of Ejectment by the mortgagee is not pleadable in abatement of an action of debt or bond: for the causes of action are different - both of these actions may go on at the same time even if the mortgagee has a bill pending in Chancery for foreclosure. -

This plea is good even where the prior suit is pending in another Court, where they have concurrent jurisdiction: - Except in Eng^d when it is in a Sup. Court - all actions may be removed into Westminster Hall by a certiorari: - but the courts there will not notice its pendency below as a cause of abatement. (5 Co 62. a. 4 Bac 48. 1 Com 48. 9. 50. 2 Wils 87.)

To give effect to this plea it is not necessary that the prior suit should

be pending at the same time of making the plea - if it were pending at the time of commencing the second suit the latter is vexatious ab initio, and will be abated. The right of pleading is abated & not taken away by a discontinuance in any way of the former suit. (1 Bac 13. 4 ib 48. 4 A. Pl. 27. Doct. plec. 107)

A suit is considered as pending from the time of the writ issuing. (1 Bac comp 4074 41. 2. Hawk 275. Co. El. 677. Co Dec 11. 5 Co 48. 7 ib 30. u. 3 Burr. 1423. 1 Post 486. Sed 1289)

It has been decided by the Corn. Sup. Court that if the first suit must be ineffectual, the second shall not abate, if they are concurrently - for here it is not vexatious: as if A to secure a debt agt B. commences a suit and attaches property which does not belong to B: on discovering this fact he sues again and attaches B's property; the latter suit will not abate. (1 Post 515, 512.)

So if an action is clearly misconceived, its pendency will not abate another action of a different kind - this case is not within the rule: for they are not concurrent nor of the same kind - as if in an action where trover only lies, plff brings trespass - this will not abate a subsequent action of Trover -

These decisions are doubtless correct - but the point has never been decided in Eng. An Action will not be abated on averment of the pendency of a former suit unless it appears to be unnecessary & vexatious. -

The pendency of an action of Book debt does not bar an action of Book debt by debt agt plff (1 Post 153. Stat con. 136.)

Tho the debt has judgmt in his favour if he proves a balance; yet if the rule were not so, the real debtor might prevent his creditor from securing his demand by commencing a groundless suit agt that creditor. -

The plea of pendency of diff't suits is good enough, tho there be a new debt added in the second suit. Thus if A be sued in Tresp. and afterwards A & B. for the same cause, the suit abates as to A - whether it does guard B is a question - (1 Bac 49. Hob 137. n. Carth 96. y. 1 Bac 13. 14. 1 Com. 49. 1 Shaw.

And e converso, if there be two debts in the first suit, and one of them is sued alone in the second the former abates, the latter - if this there is no doubt. (1 Bac 13. 14. 4 ib 99. Carth 96. y. Hob 137. -)

If the second writ is sued out on the same day on which the first is abated, the second writ shall be presumed to have been sued out after the abatement. (1 Bac 14. 49. Allyn 34. Gillb 260.

It is not settled whether the presumption may be rebutted - probably not -

That another action for the same cause is pending agt a stranger is no cause of abatement: as *q. v.* several Trespasses sued in several actions, or several joint and sole obligors &c. This is only exercising a legal right - each is by Law liable to be sued severally (11 Co. 120. 1 Com. 58. Holt 137. 8.)

It is no cause of abatement in indictments, that another is pending agt the same prisoner for the same offence - the Court in its discretion will quash the first - the Court having a kind of discretionary control over indictments

But over informations and appeals they have no such control - They are in the power of the informer appellant and the pendency of one information or appeal will abate a second. In case of indictments the grand Jurors who present the complaint are not prosecutors - they only find it - (1 Bac 13. Lib 48. 2 Hawk 190. 275. 287. -)

If two informations are exhibited on the same day by diff persons each will abate the other, as there can be no final judgment matter: - for these private prosecutors being mere volunteers, there is no reason for dispensing, in favor of either, with the maxim of the Law "that there is no fraction of a day" - (1 Com 79. Holt 128. More 864. 5. Contra 3 Bac 14. 3 Burr. 1434.)

7. Informality of process: the writ's having been unduly issued is a good cause of abatement - so in general is any irregularity or informality in the writ - this head then comprises as many particulars as there are facts in a writ - some of them will noticed - (Lawes 108. Com. 2 ab. f. a. 1.)

thus if the writ is made returnable to any other than the next succeeding term of the Court, there being time for legal service before that term, Salk 700 it abates - here indeed a plea in abatement is unnecessary, for the process (1 Rod 315: is void upon the face of it, and the officer serving it is liable in trespass.

So if the writ is issued without proper authority it is void - so it will abate for want of date, or for any impossible date as the 30 Feb^r. - (1 Com. 46. 4 Bac 433.)

In cases it was formerly necessary and still is, on such writs as are returnable before the Sup. Court or County Ct. that the duty shd be paid: and a certificate to that effect abates the writ, or the Court will ex officio take notice of it, & dismiss the suit without plea -

So if the writ has a defective return, it may be abated: as in Eng^d

less than 15 days between the test and return. In count the usual time is 12 days before the higher courts and before a single magistrate 6 days. (Co. 2250 Salt 403. 1 Will 408. 2 Kelt 461. Stat. Con. 32. 62. 188.)

So if the service of the writ be insufficient: on this subject there is a difference between the English rule and ours. By com law the service is never insufficient unless the defect appears on the face of the return the officers indurment cannot be contradicted to defeat the suit - but the deft is left to his action agt the off for a false return - it being a rule of the com Law, that such official acts cannot be falsified, except in a proceeding instituted for the express purpose, expressly alleging it to be false. - Sta. 813. 18 R. 394.

But in Court. the return may be falsified by plea in abatement - the endorsement may be contradicted: this is the more convenient rule - Under the Court Stat if property be attached and no copy left of the writ, it abates; unless there were also service by reading: in that case the writ will not abate; it will operate however, only as a summons, and the property attached under it will not be holden: for that purpose a copy is necessary (Robt 54. 128. 553. 24 186.)

In Court it is also necessary when Real property is attached on mesne process that a copy be left with the clerk of the town where the property is situated: but the omission can never be pleaded in abatement: the sole object of the Stat in such copy being, to give notice to third persons - and the attachment will not hold agt third persons when the copy is omitted. Stat Con. 35. -

Want of venue in the writ is cause of abatement: if in the declaration it may be demurred to at Com. Law -. The venue is a Statute of the place in which the cause of action is said to have arisen. (Com 45. 3 Bac 322. 70 R. 243.)

But in transitory actions the venue being wrongly laid is no cause of action: this the court may in its discretion change it on motion, & order the action to be tried in the county where the action arose: these are both rules of the com Law & do not apply here: for with us the place where the action is to be tried, depends upon the residence of the parties (1 Bac 35. 1 Will 46. Salt 669. 70. 130 Pro. 245. Corp 570. 3 East 29. Lawes 79. Com. D. act. n. B. -)

In local actions a false venue is cause of abatement: hence it is a good plea that the land or subject of the action, lies in another county, state or kingdom. 1 Bac 34. R. Ch. 29. 1 Com 47. 17. 18. 33. Com. d. ab. h 17. Stat Con. 18.)

8.th That the Action was misconceived, is cause of Abatement: as that the writ sounds in trespass, when it should be case - &c. &c. - Lawes 106. Fidd 579. 579. 579. Com. d. alt 65. Hale 110. 179. —

9.th If the right of action had not accrued at the time when the suit had commenced, it is pleadable either in abatement or to the action: as if the Adm^r brings an action in the name of the intestate - plea that letters of administration had not been granted at the time the writ was brought - tested is good.

If this appears on the record it is cause of demurrer, or motion in arrest of judgment, or after judgment of writ of error: the defect is vicinable; so in debt on bond, if it appears on the face of the declaration that it was not due when sued upon, the error is radical (2 Lev 197. Hale 179. Carth 114.

Rules as to pleas in Abatement Generally. —

Pleas in Abatement regularly begin and conclude to the writ: or in some few cases to the declaration, by praying judgment of the writ (or declaration as the case may be) that the same may be abated or quashed (3 Bl 303. 4 Bac 50. 5 Mod 132. 144. Lawes 103. 9. 160. Fidd 584. Chy 557.)

When the matter of Abatement is dehors, and does not appear on the face of the writ, the plea only concludes with praying judgment abanter (Lawes 103.)

When the plea goes to the person of deft, as in case of coverture, it prays judgment whether the plff ought to be answered — (Fidd 584. At sup.)

When the writ is abated de facto, i.e. when it would abate without a plea, the plea if made concludes by praying judgment if the court will proceed (Lawes 107)

These distinctions are not much attended to in common practice —

The character of the plea, i.e. whether it be dilatory or to the action, is decided by its conclusion only without regard to the beginning or subject matter of it. Thus if a plea concludes in abatement it is a plea in abatement tho it begins in bar — 11 Mod 112. Lawes 112. 4 Bac 50. 2d Ray 694. 12 Mod 529. 1 Sid 189. 1 Thorr 4. 6 Mod 103. — This being in its nature a positive rule, it would be well to have it settled in some way and perhaps this is as good as any. But 2d Holt lays it down that the beginning and conclusion regularly form a criterion: hence when the beginning and conclusion are alike, the character of a plea is decided — 4 Bac 69. Lawes 107. 145. 6. 589. 71. 2d Ray 593. Fidd 584. Chy 556. 7.

This is the genl rule; hence tho the matter pleaded would be good

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only in bar, still if the plea begins and concludes in abatement it is a plea in abatement - and would be treated as such - but when the matter is good only in bar, if the plea begins or concludes in abatement, it is applied in bar: for there being a difference between the beginning and the conclusion, reference is had to the subject matter to decide its character - (4 Bac 49. 6 Mod 103. 1d Ray 1078. 579.)

It would seem if matter good only in abatement is so pleaded as either to begin or conclude in abatement, it is a plea in abatement - But it is now settled that if such matter does not both begin and conclude in abatement, and it is found for Pff, it should be treated as a plea in bar & judgment agt Deft should be final. But if found for deft it should be considered a plea in abatement: the object of the rule is to discourage dilatory pleas. - (1 Chy. H. 6.)

If a plea is good either in bar or abatement in differently, and it begins as a plea in bar & concludes as a plea in abatement or vice versa, the plea in replication may treat it as the one or the other at his election, & the court will consider it as such (1 Vent 136. 3 Mod 281. 4 Bac 50.) With this single exception then,

The rule is that Reference is to be had to the subject matter of the plea, to decide its character, only when the beginning and the conclusion differ - And if matter which is good both in bar and abatement (as outlawry) begins in bar & concludes in abatement or vice versa, the Pff may treat it as a plea in bar or abatement as he pleases - (4 Bac 50. 1 Vent 126. 3 Mod 281.)

As to the form of beginning & concluding in abatement & bar vid 3d Ray 21. 539. 107-16. Lawes Appx. Littles entries abt. pass. -

A plea in Abatement founded on matter which goes in bar only, and a plea in bar founded in matter which goes in abatement only are ill: - As if deft shd plead Judgment or want of addition in bar 4 Bac 56. y. 50. 1st 14. 86. 1 Mod 244. 12 d 400. 1 Inst 128-g. d. And the rule does not extend to cases in which the matter is such as may be pleaded either in bar or in abatement - Thus outlawry may in certain cases be pleaded either way (4 Bac 50. 1 Mod 249.)

Double Pleas.

A defendant may not at once plead two diff't dilatory pleas to the whole or any part of the writ - for the law will not allow him to plead more than is sufficient to answer his purpose - he may however plead several kinds of dilatory pleas in their proper order, as the jurisdiction of the Court - the disability of Pff &c

and if these prove insufficient he may plead Abatement - but he cannot plead two dilatory pleas of the same kind to the same writ - as two outlawries - for one is as good as an hundred - (4 Bac 50-118. 1 ib 15. 3d Rep 183 - Carth 9. 1 Com 66. 1 Inst 374. a. Laves 107. 8. 40th 280. Doct. plac V. Com. di. at 23. Cr. 6.)

The deft then cannot plead more than one plea in abatement properly so called - this rule has been misapprehended in Com. & in some of the other states - it is the practice here & allas. (Story Plead 60) to assign any number of causes of abatement in one plea - this is founded on an observation of 2d Coke 1 Inst 374. which does not support the practice. -

When cause of abatement is pleaded & judgment rendered upon it, error lies as well on the interlocutory judgment as on the one in chief - but not till judgment in chief is rendered - for the party against whom the plea in abatement is decided may prevail upon the merits - in that case a writ of error would be unnecessary. But matter of abatement is no ground of error unless it is pleadable in abatement - if not so pleaded it is waived (3 Bac 153. 67. 2766. Doct. plac. 5. Carth 124. Co. 26. 574.)

But when the defect is such as goes also to the action, and is one which may be taken advantage of in any stage of the pleadings, it is not waived by omitting to plead it in abatement - as in case of outlawry of Plff which in some cases forfeits the cause of action vid. ante) or if a feme covert is sued alone (4 Bac 39. 57. 2d Ray 594. 1 Roll. R. 53. 1 Mod 244.)

To vie facias or judgment deft is not allowed to plead in abatement, any thing which he might have pleaded in the original action - by omitting to plead it at the proper time he has waived it forever - (1 Saund 219. 1 Salk 2. 310. 4 Bac 50. Co. 26. 280. 574. 1 Inst 373. 57. R. 689. 1 Wils 258. 1 Holt 292. Sta. 932.)

A writ may be abated in part only & remain good as to the remainder - this holds tho' the plea in terms goes to the whole writ & prays that the whole may be abated - thus in debt on two bonds deft may plead nonjoinder of co-obligors & if this is found to be the fact as to one but not as to the other, the writ will abate as to the first & hold good as to the other (Laves 103. y. 113 & 120.)

And deft may sometimes plead in abatement as to part & in bar as to the residue - as in ass. on two promises, deft may plead, as to one nonjoinder of co-promisors & as to the other non assit (see supra.)

This rule & the preceding one hold only where there are two or more

causes of action in one suit: for when there is but one single, individual cause of action part cannot abate without the whole. —

As to the judgment on a plea in Abatement, since the plea does not go to the merits of the case (merely to form) judgment upon it is in general no bar to a subsequent action for the same cause — but when judgment on such plea goes in chief, as in some instances it does, it is a bar to a subsequent action (1 Bac. ab. 29, 115, 21 Cal. 2. a. 617 y. 8. 46. 78. 1 Vent 178 — Com. dig. ab. L. 4. 8 Co. 37. 698.)

On this subject the distinctions are, first the judgment on plea in abatement if for debt is that the writ or declaration be quashed & abated (1 Bac. 57. Feb. 12, 1782 ^{2 Thomp.} 1 Vent 22) This puts an end to the action — tho' under stat. of amendment, debt may amend his writ and begin another —

2^d. If judgment be for plaintiff on demurrer "respondere oster" is awarded — i.e., that debt answer over, his plea being insufficient (1 Bac. 57. 3 Bl. 303. 376. y. 2 Will. 307.)

3^d. But if an issue in fact be joined on the plea (as it may be when matter is debated) & found for plaintiff, judgment in Eng^d goes in chief "quod recuperat" and is final — This rule is intended to discourage false dilatory pleas — debt takes the consequences of a false plea to a true action (1 Bac. 15. Feb. 21. Feb. 12 East 544. Ld. Ray 2094. 6 Mod. 236. J. Ray 219.)

This rule does not hold in indictments for capital offences — it is restrained in favorem vite, & the prisoner may afterwards plead in chief (2 Hawk 334. 574. 1 Bac. 15. n.)

The rule holds in Comm. practice even in civil cases, if the issue is closed to the country — for there shall be but one trial by jury; but if the issue is closed to the Court, it has been usual to award a "respondere oster" (Lawes 33. 2 n. s. Comm. R. 377. — The reporter has not noticed the true ground of the rule — which is if matter of Abatement is pleaded in bar, judgment in chief is rendered for plaintiff. (1 Chy 445. 2) If a plea in abatement is suff^t in law & the allegations in it true in fact so that plaintiff cannot defeat it he may enter a "cessatur breve", i.e. that his own writ be quashed, & thus prevent the delay & expense of judgment upon it. (Lawes 16) But this is unnecessary — he might suffer a nonsuit.)

A debt cannot demur in abatement — this rule is blindly expressed & has been variously understood — It seems (to L. G.) that matter in abatement in the writ is no cause of demurrer — since that reaches only the pleadg (Plover 73. contra) If then one does demur on matter of mere abatement, judgment goes against him

in chief. - Here again we have an exception in *procurator* actions & judgments for capital offences - they do not on such demurrer go in chief (2 Hars 2244. or 334. Lawes 172. *Self. Con.* R. 203. 1 Bac 15. 5 Mod 173. y. l. 77. Salk 220.)

After August "Respondent aster" on a plea in Abatement, a second plea in abatement is not admitted - otherwise a deft might continue to plead in abatement in infinitum (1 Bac 57. Holt 126. 2 Saund 46 - Doct. Plac. introd. V. -

If however after judgment that a writ abate, plff amend, deft may again plead in abatement - for after the amendment the writ becomes a new one - (Hily 5. 6.) As to the whole & half vide *Com. di. Abat.* 9. 16.)

After a general imparance or continuance deft cannot plead in abatement unless the cause of abatement arose after wds (1 Bac 97. 4 it 29. 1423. Salk 183.

The same rule holds when the time of pleading in abatement has expired - during this is four days (Comd.) in *Comm.* the time allowed in *Cap. Ct.* is till the opening of the court on the second day of the term - in County Ct, till the unparralling of the day (Post 574.)

The rule as to time of pleading in Abatement, does not hold where the cause of abatement ~~arises~~ arises after the time has expired - eg. Plff & some sole marries after rule is out - Nor when the law continues an action from the first term to the second as a matter of course - as in case of all actions of foreign attachment -
+ In such case the same time is allowed as in the second term. -

Matter of abatement cannot generally be pleaded after the rule is out, in any form, unless it goes also in bar & must be pleaded in bar - e.g. outlawry in some cause, coverture of deft &c. & ante - Matter of mere Abatement then cannot be pleaded in any case after the rule is out, except when new causes of Abatement arise afterwards - (Lawes 1735. Fild 77. Doct. plac. 297.)

It is said that there can be but one plea in abatement - deft is restricted to one - otherwise he might plead in infinitum. -

II. Pleas to the Action. -

In the ancient course of pleading there appear to have been three descriptions of pleas in bar - viz. 1 General issue - 2. A denial of a particular allegation in the declaration. 3^d A special plea of new matter not appearing on the face of the Declaration - (Hily 465) - (Lawes 110)

1 of the General Issue. It is usually defined as being "a single, certain, and material point, issuing out of the allegations of the parties & consisting generally of an affirmative and a negative - This has always been the definition since the time of Ed. Coke & perhaps before - (4 Bac 54. 5 Co 142. 1 Inst 126 a. Corn. D. R. R. 1 Chy 636.) But it is not strictly precise - It is a good definition of a good issue; the word material confines too much - but there may be issues which are not material, which could not be of material entered into the definition of an issue.

According to the old rule, there must be in all cases, except that of a writ of right, a direct affirmative & negative to form an issue - plead & what is barely inconsistent with other allegations makes no issue - this is the genl rule at this day - as where one pleaded that J. D. was dead & the other that he was alive - this is no issue - the latter shd have added, "alioquin hoc" that he is dead (1 Vent 213. 1 Inst 1062. 4 Bac 55. 90. 70. 2 Bl. R. 1312. 8 T. R. 278.)

But the rule has been somewhat relaxed in one or two instances in modern times - thus when a Def pleaded that he was born in France, & P replied that he was born in Eng & concluded to the country, it was holden a good issue, tho' there was no direct negative - Yet this is no stronger an instance than the one before cited (12 Will. 6. Sta. 1177.) It is laid down in Stange that where the second affirmative is so far inconsistent with the first, that the first cannot in any degree be true, it is a good issue - (Sta 1177. 1 Chy 630. 3 Bl 303.)

But the old rule is the best - it is the simplest way to abide by it - all that is necessary is to insert a bare negative in an affirmative proposition, & strike it out, if the proposition be negative.

In a writ of right the Genl Issue is always formed of two affirmatives - It is not called the issue, but the mise. (1 Sam & 11.) Thus if dem demand & declares that "he has more right than the Tenant" the Tenant pleads "that he has more right than the demander" (2 Sta 1177. 3 Bl 303.) This is an established exception to the Genl rule - see Lanes Appx. 232 - 3.)

This action on writ of right sounds neither in Cont nor in Tort - It is always safe to close up the issue according to the old rule - indeed any qualification of it tends to looseness & uncertainty, & there can be no reason for relaxing it - the application being in all cases perfectly simple. -

Issues in fact, viz. when facts are denied on one side & affirmed on the

General Issue

Other are either General or Special - . Lawes speaks of a common issue in the case of Court broken, where non est factum is pleaded - for it denies the deed only and not the breach & therefore does not contradict the whole (any part) of the declaration in issue - There is said to be no Genl issue in that action - (Lawes 110-13. 4 Bac 54. Fidd 593. 3 T. R. 283.)

The Genl issue is a denial of all the material allegations in the declaration, or all those wh. plff is required to prove in first instance - (3 Bl 305. 4 Bac 54.)

A Special issue is one wh. is joined on some particular part of the declaration (1 Inst 126. a. Lawes 112-13. 145-5 Com. 142-3 Bl 305.) This often answers the very purpose of a Genl issue - for the right of recovery often depends on a series of facts, and must fail if one of them is disproved - In such cases special pleas are very convenient by dispensing with needless testimony -

When the denial of any particular fact, if it prevail, denies the whole right of action, special plea of that fact will defeat the suit -

The distinction between Genl & Special issue holds only in issues taken to the declaration - they are called issues without when taken on any of the pleas which follow the declaration -

To actions founded on any misfeasance "Not Guilty" is in genl a proper Genl issue. To debt on simple contract "Nil debet". For Specialty "Non est factum" in this case "nil debet" is not proper, for it confesses the deed without avoiding it - To Debt on Judgment "Nil hel record" - To account "Never Bailiff or Receiver" - To Adv. "Non est" - To Warranty in Tort "Not Guilty" (2 Inst 446.) To Replevin "Non cepit" To Ejectment "Not Guilty" To Disseisin "No wrong, &c" To Warranty on Contract (No Warranty) (3 Bl 305-4 Bac 54. Bro. El. 257. 2 Mod 244.)

To debt on Stat "Nil debet": tho' as the claim is founded on an alleged crime "Not Guilty" seems also a good plea (1 T. R. 462. Cro. El. 257. Noy 55.)

It was formerly holden that Not Guilty was a good Genl issue in Assault - but this is exploded: for tho' this action is called Trespass on the case, yet it is only a contract - the plea however is not void & is still aided by verdicts (4 Bac 54. 3. 84. 1 Lev 142. Sta. 1022. Esp. d. 167. 1 Chy 469.)

In debt for rent the usual plea is "nil debet". But it has been resolved that "Non currit" is also a good plea - not so in Court broken for rent - here the plea neither denies the Court nor breach, nor does it allege

any thing in avoidance of it - it therefore confesses damages (Corp 588. 12. ch. 15.)

To debt on bond "nil debet" is not a good plea - for it neither denies the execution nor offers any thing in avoidance - if however P^lff does not demur to such a plea but joins issue, he lets debt in to any defence which he might offer to debt on simple contract. (5 Esp 38. 1 Chy 478. 2 Johns 183. 8 id 82. Com. D. pl. 142. 1 Hask 324.) - for P^lff by accepting this issue, places his claim upon the fact of an actual existing debt independently of the conclusive evidence offered by the deed & thus makes the bond a matter of estoppel. -

The bond issue refers to the Court & not to the mit - for pleas to the action go only to the declaration - thus if in an action of account the writ charges debt as receiver guilty & declaration as receiver by the hand of A, the joint issue "never receiver" contradicts only the Court & P^lff is confined to proving that he was receiver by the hand of A. (1 Inst 126. a. 4 Bac 57.)

The bond issue like all other issues in fact conclude to the country, & is tried by the jury: for the jury are the country in the language of Pleas (1 Inst 126. a. 4 Bac 57.)

But there are other methods of trying an issue in fact, at Com. Law than by a jury. as by Record, inspection, or in case of a plea of infancy, certificate - or in case of a plea to wages of Law - & wages of Battel - 3 Pl. 310. 13. 15. 21 Bac 574.

The trial by wages of Battel was supposed to be long since extinct - but in a late case, the Ct of Kings bench have revived it.

In the eye of the law of this country every issue is determined thro' the instrumentality of records, certificates, & a jury - hence if a jury do not agree, a "venue ~~de novo~~" is awarded - for the Court have not tried the issue; their instrument has failed. -

The ben't issue of "nil till record" concludes with a verification & not to the country - for a jury cannot try a record, which is matter of law to be tried by the Judge. (Lawes 146. 8. 22 b.) In answer to this plea the party pleads the record - he must answer, own & affirm the assertion of the record, and pray an inspection of it by the Court (Lawes 148. 2 T R 440. 2 Will 1124. 1 B & P. 11. 5 Esch 272. 2.)

But if the record of a foreign municipal court is denied, the conclusion must be to the country - for it is not a record tho' we can find no other word to express it - the written memorials of a foreign Court are not records, nor matter of law for the Judges, but of fact for the jury - and are provable generally only by

sworn copy - this being mere testimony, the jury weighs it. (5 East 472. d.)

Records of foreign courts of Admiralty are conclusive here - they are deemed records - The Rule must be the same of course when a record of our own court is pleaded as lost or destroyed - for the former existence of the record is matter of fact to be tried by the jury. In Conn. issues in civil actions before a single Magistrate must conclude to the Court - so in criminal actions -

As to the form of tendering an issue in fact - if the traverse a denial comes from deft he concludes thus: "as for this he puts himself on the country for trial." If plff tenders the issue he concludes thus, "as this he prays may be enquired of by the country." (1 Inst 126. a. 3 Bl. 213. 4 Burr 52. 6 Litt 126.)

If however the issue tendered by plff is in negative terms, it may conclude in the former manner, & the conclusion will be good on special demurrer (10 Mod. 166.)

The issue is then closed in both cases by the opposite party alleging, "and thus the plff (or deft) doth likewise" - this is the similitur - Omission of it is aided by verdict (Lawes 147. 8. 2 Day 392.) but not in Eng^l - the similitur is no part of the plead^{gs}, but merely the consent of the parties that the issue be received - (Sta 641. Corp 407. 1 Saund 319. 3 Burr 1793. 2 Saund 399. &

An issue closes the pleadings & when well tendered on one side must be accepted on the other - if not well tendered it may be demurred to - (13 Jac. 450. 3 Bl 314. 1 Inst 126. a. 1 Saund 388. Comb 86. Carth 86.)

The words "in manner & form" wh. are only used in tendering, the issue are sometimes the substance of the issue - & sometimes merely form: thus they are not of the substance of the issue, i.e. do not put in issue the circumstances attending, the principal matter, as time, place, manner &c unless these were originally & materially necessary to be proved as laid - (Lawes 49. no 8c.) - hence in an action for a battery said to have been committed with a club. if plff plead that he is not guilty "in manner & form" the manner is not put in issue, & proof of a battery without a club supports the declaration - so generally to time & place unless a difference in these respects makes a variance.

But when the circumstances of manner &c are material the words "in manner & form" traverse them: thus if deft in Resp. ge. cl. pr. pleads a self-ment by deed from J. D. & Plff traverse it "in modo & forma" proof of the self-

ment without deed, tho' it is good at C-Law cannot be received - for the deed is of the substance of the issue (Hitt Sec. 489. 1188. 1 Chust 231. b. 4 Bac 56.)

So of place when laid out as a venue but by way of local description. In local actions place is always material (2 East 497. 1182 226. McC. 1120. 501. 3. 7.)

An immaterial issue, is one which, leaving a material allegation on the other side, is taken on a point wh. is immaterial: as if debt takes issue on matter of mere inducements, or that wh. is impertinent, or not alleged, or mere surplusage - such an issue is not aided by verdict (2 Saund 319. n. b. Hitt C. pl. 147. 12032.) as if in Ass't agt an executor he pleads that he (instead of Testr) did not assume & promise (2 East 196. 3 Bl 395.)

If an immaterial issue is found in favor of him who tenders it, a re-pleader "venie de novo" is awarded - Secus ubi - (2 Moll 187. 4 Bac 56. 1 Wils 338.) But if there is no material allegation in substance in the pleadgs on the other side & the party tendering the issue traverses the whole of it - the issue is not immaterial - It is as good as the case admits: this shews the use of the words, leaving what is material on the other side" in the definition. -

Issue cannot be joined on a Negative Preamb, nor on an Affirmative preamb - by a Neg. preamb is meant one wh. implies an affirmative - by an Aff. preamb one wh. implies a Negative - (Chy 53.) As if debt shd plead a release since the date of his mit & plff shd reply that it was not his debt "since the date of the mit" it would imply that the release was his before the date of the mit & therefore is a Neg. preamb. The proper traverse to this would be "in modo & forma" (1 Chust 126. Co Lac 87. 212.)

Negative
Preamb

Such pleadgs by Stat 38. Hen. 8 are aided by verdict, whether found for plff or debt (2 Saund 319. n. b. Hitt C. pl. 147. Bro Blac) It so at Com Law, unless the court shd discover for whom judgment shd be rendered. There is much apparent confusion in the books on this subject. It seems however, that such pleadgs are good when the negative or affirmative implied, is not sufficient to support the allegations on the other side. Secus bac. E. 9. Debt in an action on contract pleads that he was correctly observed to reserve 9 p. of interest. Plff replies that it was not correctly agreed to reserve 9 p. of interest - Debt replies that it was not correctly agreed to reserve 8 p. of int. But as this would not support debt's plea, the replication would be good - (Lanes 114.)

It appears that a Negative Pleading is void on special demurrer only. (1 Bac 98. 1st 94. 2d Ray 237. 2d Saund 319. note. Gibb C. pl. 153. —)

An issue joined on a Negative pleading includes what is material as well as what is not, and in this respect it differs from an issue strictly & entirely immaterial (vid. ante) in wh. case the mistake is not regularly aided by verdict.

An informal issue is one taken on a material point, but incorrect in point of form — the expression "taken on a material point" is used, because if taken on an immaterial point the issue is immaterial & then that quality characterises the issue, tho' it may be defective in form — this is of course aided by verdict & will only on special demurrer — 1st Bac 56. 1st 103. 2d Saund 319. note. 3 Bl. 395. Carth 371. 1 Lev 32. Cro El 227. 2 Mod 137. 3

Tho' the Gen'l issue covers the whole declaration, so that under it deft may contest all the plffs allegations, yet it is sometimes proper when he does not intend to contest any one allegation in the declaration: as when a contract sued on is void tho' the absolute incapacity of obligor — this incapacity may be given in evidence under the Gen'l issue. E.g. If a feme covert be sued on bond Gen'l issue may be pleaded, & her coverture given in evidence — for the law regards her as a mere nullity, 1alk 7. 2 Bl. R. 1082. Gibb 202 162. 2 P. Wms 145. 78. 1 Chy 78. 6. Mod 311. 3 Keble 228. 12 Mod 669. —)

But if the deed be void in its own nature, & not from any incapacity, in the party making it, the Gen'l issue is not the proper plea — Thus if a bond be given on an usurious contract the usury must be specially pleaded — for tho' as to its legal fitness to create a duty, the bond is as tho' it had not been made — yet as the obligor was under no absolute incapacity, it is considered as his act in point of fact, tho' not obligatory in law — the defence therefor does not support the issue. —

So if the deed is only voidable, or if the incapacity of the obligor is not absolute, as if it be made by a party under duress, or an infant or idiot. (2 Bl. 292. Esp. a. 223. 1 Bac 54. 62. 5 Co. 119. Plowd 66. Gibb vi. 162. 3. 175. 2d Ray 313. 18672. 1 Chy 478)

It is a gen'l rule at Com. Law that if a specialty is made void by stat., the special matter which renders it so, must be specially pleaded. — It cannot come in under the gen'l issue — as in the case of usury above mentioned — The reason assigned by 1d Coke (that the Law seems too highly of a deed to allow it to be thus done away) is not the correct one — if it were

"Non est factum" would not be pleaded to the deed of a feme covert - the true reason is that the defence is inconsistent with the legal issue. (5 Co. 119. a. Holt 72. Exp. d. 23. 1. 1. bill co 163. 2 Bl R. 1108. 3 Burr 1805. 4 Chy 4.)

As a legal rule, when matters of fact only (i.e. matter of denial) are in question under the plea of non est factum, the allegats in the declaratⁿ are denied - this does not in its own nature involve any other than matter of fact: except in the single case of a feme covert sued on bond, which proceeds on the legal idea that for the purpose of exceptions to deeds she has no existence. (Chy 478.)

Matter of Law, by which is meant in the language of plead^g, mere special matter of evidence, is never brought into view under the legal issue, except in the single case of Coverture: thus Alteration in deed, Loss of seal, Rescission, want of complete delivery, go to prove that it is not the act of the party, and may be given in evidence under the legal issue. (5 Co. 119. a. 11 Co. 27. a. Exp. d. 223-4.)

It seems a hard case that a misfortune, (as if a mouse should eat off the seal) should deprive a man of his estate - he may obtain relief in Equity.)

The distinction between those defences wh. are, & those wh. are not admissible under the legal issue is this - if the defence is consistent with the plea it is admissible - Secus non: Thus Alteration in a deed is consistent with the plea of non est factum - for as alleged, it is not the deed of the party - but usage is inconsistent with the plea - for it admits the execution: Still however in actions of Assumpsit any thing in general wh. shews that the Plff at the time of plea pleaded has no right to recover, may be given in evidence under the legal issue. (I formerly ventured to observe that this would hold only of implied ass^t in strictness) - In that action it is justified on the ground that as the promise is a mere conclusion of law from the fact of indebtedness; whatever extinguishes or disproves the indebtedness the promise - Non Ass^t then, in those cases, does not mean necessarily or merely that debt did not actually promise, but that he is not liable at the time of plea pleaded. According to these principles,

Infancy, duress, award, prior discharge (by the later judgment) accord & satisfaction may be given in evidence under the legal issue in indebted Ass^t. 4 Chy 498. 4 Bac 605 2 Roll 682. 3. 3 Burr 135-3. 2 id. 1010. # 1d Ray 546. 787. 2 H. Bl 143. Day 108. 1 Chy 470. 2. 5 East 230 4 Exp. 181. 3. Mod 370.)

On strict principles (as before stated) this rule does not extend to special Ass^t.

Chy B. 197.8. Esp. d. 147. 41 Bac 60. 1. 124. 5. lled 18. 12. 1777. Ld Ray 566.)

The practice of extending the rule to special Ass't has originated in a mistake from not distinguishing in particular instances between special & implied Ass't. but it is the common practice - (1 Lev 142. - Salk 140. Bull. N.P. 51. 2 Mod 100 contra.) Ld. Mansfield in one instance seems to lay it down the same rule in relation to actions on the case generally - (Burr 1350 - 4 Bac 61.) but this cannot have been his meaning.

The stat of limitations, tender, set off, Bankruptcy, and according to some opinions accord & satisfaction must be pleaded specially in all cases of Ass't - Chy B. 198. Esp. d. 147. 1 Saund 283. n. 2. 3 Bac 578. Ld Ray 553. Lidd 375. - then being matter of law we do not go to the gist of the action but to the discharge of it i.e. which destroys the action or remedy, whereas the defence in the former example (usury) denies or discharges the duty.

In debt on simple contract, the stat of limitations may be given in evidence under the genl issue, because it is said, at the plea of Nil debet is in the present tense, and denies present indebtedness, the defence is consistent with the issue. And so of release for the same reason - for tho' there once was a debt, the release has extinguished it - (Ld Ray 566. 553. Salk 176. Esp. d. 262. 5 Mod 588. 2 Lev 215.)

On this principle the rule would be the same in indebt Ass't - advantage may be taken of stat of frauds & perjuries under genl issue - for where stat requires a promise to be reduced to writing, it can be proved only by written evidence, in debt then may plead genl issue and object to the admissibility of parol proof. (2 Lev 244. 1 Bac 192.)

This mode of admitting special matter of defence under genl issue, is not allowed at Com. Law, in case of Tort any more than in actions for specialties.

Release, Liens &c must be pleaded - the genl issue is a denial that debt ever did the act complained of - but this justification shews that he actually did the wrong, & that he either had a right to do it, or his liability has been removed - the defence then is inconsistent with the plea 41 Bac 60. 2 Roll 682. 5 Mod 252. Ast 174. 5. Corp 478. Esp. d. 317. Bull. N. Piers 17. 1 Inst 282. b.)

It is a universal rule that every defence to the action which cannot be specially pleaded may be given in evidence under the genl issue (Lanc 111.)

In Com it is a rule introduced by stat and applied to every action, that

deft may give in evidence under the genl issue any matter of defence or justification which goes to the action: & except some acts of P^lff, by which deft is released or acquitted of depts demandth - so that here the question is not the consistency of the defence with the issue, but its being or not being the act of P^lff. (Stat Conn. 322.)

It is a rule of com. pleas however, that when deft intends offering special matter under the genl issue, notice thereof is given to the other parties (2 Swift 208.)
^{ing} All these must be specially pleaded - an act of P^lff ante eadem to the alleged genl operates as a justification, may be given in evidence - as license in qu. el. p^r.)

To probably any other act of p^lff which shows that he had never a legal cause of action; as duress in an action on contract. (Kirby 239) So forsworn, misprison, &c. (3 Day 69)

Here too the stat of limitations may be given in evidence in actions of book debt; so in tort - but as to torts it otherwise in Eng^l (3 Bac 578. 4 id 61.)

It is said by Judge Swift, that it cannot here be given in evidence under the genl issue in deft, because it contradicts the plea. (2 Swift 615.) But this is not law - for that is not the criterion under our stat -)

In Conn. a release may be given in evidence under the genl issue notwithstanding the exceptions in the stat - for our stat was not intended to prevent deft giving in evidence any defence which were admissible at Com. Law; and the release is within the terms of the issue & therefore admissible on com. Law principles. (2 Day 272. Ld Ray. 560. Talk 248. Corp 588.)

2nd. The deft may instead of pleading genl issue, deny any single traversable fact alleged, wh. goes to the gist of the action & conclude to the contrary - the issue thus formed is called a Special issue. (Lanes 171. 2. Com. d. pl. E. 4 Bac 10. 2. y. 1. Inst 282. Yelv 175. Doct pl. 203. Symb. 116. or 121. Lanes 112. 35. 95. Gibb Com pl. 61.)

In this case the plea, tho it selects only a single traversable fact, should go to the whole declaration; for the traverse of that single fact is an answer to the whole.

If a plea tendering an issue in this manner is made an answer to part only of the declarattⁿ - the residue must be answered in some other way - but if this there is no need, when the fact denied is so material as to deny the whole.

3^d. A Special plea (i. e. one alleging new matter) amounting to the genl issue is regularly inadmissible: (a) special plea is said to amount to the genl issue, when the special matter alleged in it, goes in denial of the allegations in the declaration - this unnecessarily burdens the record

64 and tends to refer questions of fact to the Court: as if we said in Tresp. shd plead that at the time of the act done he was in a foreign country - this amounts to guilt issue and is therefore bad - So if he shd plead specially, properly in himself, or in a stranger (4 Bac 60. Holt 127. Co. El. 268, 329. Exp. d. 318. 4 B. 2 Vast 247. Clerk 309. 3 Bl. 309. Co. Cas 167. 2 Swift 210. 10 Co 90. 3 Lev 41.)

Such pleas, tho they allege substantial facts in the form of new matter, are in fact a new denial of Plff's allegations - whereas nothing in guilt ought to be thus specially pleaded by the deft, except new matter, the legal sufficiency of wh. it may become necessary for the Court to determine. -

Titte may be specially pleaded in Conn. to Tresp. on lands, (by Stat 32. 5. 4. 25.) So it may, at Com. Law by giving color to Plff - i.e. by giving him colour of Titte (3 Bl 309. Post.)

As to the Genl rule that pleas amounting to guilt issue are inadmissible, there are the following exceptions: 1st The Court in its discretion may allow such a plea, if the facts stated be sufft to create a doubt in the Lay Jurts - but when the defence amounts to a mere denial of the declaration i.e. when it is mere matter of fact it is inadmissible. (4 Bac 60. Co. El. 87.)

2^d A special plea amounting to guilt issue is good if it contain special matter of justification (3 Lev 40. 4 Bac 61. Co. El. 268. Exp. d. 318. 5 Bac 202.) - a matter of Law ought always to be shown to the Court (Saund 298. n. 1. 1 Chist 283. a. 3 Mod 137. 8. 1 Bl 107. 8. 4 Mod 378. 4 Bac 60. Holt 127. 295. Com. D. Pl. 2. 17.)

3^d So in Tresp. & assize - a special plea of titte giving colour is good. (Post) Pleading spec^l what amounts to guilt issue, when not warranted by the above exceptions, is according to the authorities, good ground of special demurrer (4 Bac 60. 134. 5 B 202. Co. El. 112. 137. 1 Bl 308. 1 Chy 498. 5 Bac 20.) But still, it seems the Court may, in its discretion allow the plea (Co. El. 87.)

According to other authorities, it is not regularly a cause of demurrer, but of motion to the Court that guilt issue or "nil debet" be entered (2 Bac 202. 2. Holt 127. 1 Leon 178. Co. Cas 165. 5 Mod 274. 5 B 13. 1 Chist 303. 6. 1 Chy 493. 2 Day 431.)

This last rule seems to be the correct one - for on demurrer the Court has no discretion - but it is deemed expedient that Court shd have discretion in allowing or disallowing the plea - It has been so decided in Conn: tho the common practice is to demur - (2 Day 431.) Probably both rules have their applica-

2 Mod
374.

tions; tho' the Genl rule seems to be that such plead^g is ground of motion to the Court. If the Court will not allow the plea and deft instead of plead^g the Genl issue joins in Plff's demurder the Court will decide agt him (4 Bac 124. 81. 10 Co 94.)

But it is never necessary to resort to a demurder - for if deft (after being disallowed his plea) refuses to plead Genl issue, and joins in Plff's demurder, the agt will be rendered on the demurder & of course agt him - (4 Bac 124. 51. 10 Co 94. 10 Co 105. 517.)

There is a difference between a special plea amounting to Genl issue, & one stating facts which in evidence would support Genl issue - thus release will support plea of Not debt on a simple contr. but it does not amount to Genl issue and may be specially pleaded - So of infancy, Coverture, duress &c. cely B. 197. 8. 1d Ray 88. 1alk 394. 5. 5 Mod 18. 4 Bac 62. 124. 5 Com 76. Carth 356. - All these might be given under Genl issue (Lawes 112. Fild 507. 9.) - But they do not deny the Genl issue always does - The Genl. rule of distinction is this: "No plea which admits that there was ever a cause of action (as release, payment, duress &c.) or matter that the allegations in the declaration are true, amounts to Genl issue. X
- the facts pleaded might be given in ev^d under the Genl issue & would have supported it - but they do not deny the declaration (1d Ray 88. 9. 566. 784. 4 Bac 62. 124. cely B. 197. 8. Cro. El. 871. 1alk 394. 1 Inst 282. b. 283a. Carth 188. 1 Chy 491. 2. 6. 138 R 233.)

In such case the defence is matter of Law - by wh. is meant some special matter of fact, the legal suff^y of wh. may come in question: thus a feme covert may, to debt on bond made during coverture, plead her coverture to the action. 1d Ray 88. 9. 1 Chy 4 37. 4 70. 1 Mod 101. 15. R. 575. - Advantage is taken of her Coverture in this case not by way of privilege agt being sued alone (as in case of plea in abatement) but at rendering that contract void in form. (2 Chy 2. 225.)
In Conn. it is customary to plead Spec^l all other defences than the acts of Plff. (wh. are so pleadable at Com. Law) in actions on Contract - but in cases of Tort the Genl issue is almost always pleaded.

Plead^g Spec^l what am^t to to Genl. issue is warranted in assize & Tresp. by giving color to Plff. Giving color consists in allowing in Plff some fictitious title suff^y at Law, to give opportunity to deft to introduce his own title or record in answer to it, that the Court may compare them - In this way the rule agt plead^g title in Tresp. is evaded - The deft must take care, in these cases not to give Plff too good a title or he may defeat his own object (4 Bac 162. Lawes 57. 126. 7. 150.)

10 Co. 88. 90. 1. Co. Lac 122. 3 Pl 309. 5 Bac 208. 7 T. R. 352. 8 ib 403. 2 Chy 572 title is good defence unde Genl issue.) But deft in Resp may plead "Libaum Tenementum" without giving colour - It does not deny the declaration, as Plff may still have some right or possessory title &c. The rule depends upon the doctrine of -
was in one case not traversable Co Lac 574. n. d. Lam 6 Mod 117. 1 Sam 299. 8. Wils 218. 2 Bl. R 1089. Lawes 128. Story Pl. 587. 70. 122. 1 Chy 500. 5 T. R. Com. D. Pl. 330 34 40. Recd when Pleadors title goes only to the possession (Lawes 128). -

In replying matter of title to a plea of title plff need not give color (East 212) Lawes (157) says he may - Sed qu. would it not be ill on special demurrer?

There is another mode of pleading special facts wh. go to prove Genl issue: and that is after stating the facts, to conclude with the Genl. issue. as q. of attornment in a specialty, deft may plead that the bond or deed has been altered & so is void & void: this is called the genl issue with an essence (2) a so - Gilb 20. 164. 6. 2 Bac 62. 89. 5 Com 85. 1 Kell 274. 1 Vent 9. 216. Plond 66.)

Under this plea, deft can give in res only the matter pleaded: - It concludes to the country (3 Kell 26. Esp. 222. 9 With a verification Gilb 64. 5. Story 112) But this last is a strange doctrine - for if it concludes with a verification, it ceases to be a plea of this kind: It becomes a special plea in bar amounting to Genl issue. - This mode of pleading is beneficial in giving justice to Plff of the true defence, and confining the proof to the particular facts stated in it. Gilb 20. (163-4.)

It is said plff may plead over and take issue on special matter - (ack 274.) but in this there can be no possible use - for the special matter is of course in issue if not demurred to, & deft is bound to prove it - This plea may be demurred to even when it concludes to the country (Gilb 20. 164. 5.) - This is perfectly reasonable for Genl issue is a mere conclusion of law from the facts stated, and as they may not be sufft in law to support it, it is well to demur and put them sufficiently in issue at once.

Lord Holt says that all "special non est factum" as he calls this plea, are impertinent because they subject deft to the "onus probandi" (4 Bac 62. 212. 11. n. d.) But his Lordship forgot, that in such cases it was deft's own choice to take it - the fact is, it is much the most liberal way of pleading. It is advantageous to Plff, without prejudice to Defd. -

67

II. Pleas to the Action of the second class, viz. Special pleas in Bar.

Every plea to this action is a plea in bar - a special plea in bar is one wh. confesses the facts stated in the declaration & alleges something new in avoidance of them (4 Bac 2. Dyer 66. Lawes 37. 8. 1157. 129.)

This definition tho' genuine, is not universally so - for a special plea in bar is one wh. alleges "special matter in bar of the action, and concludes with a verification": for it sometimes traverses the declaration in part. The former definition therefore is too genl: it excludes this latter circumstance. - (4 Bac 70. 95. Hob 104. Esp. d. 415. 2 Vast 179. Co. El. 30. 418. Lawes 116. 118. 148. 121.)

It regularly admits all traversable allegations wh. it does not traverse, and goes in avoidance of what it admits. (4 Bac 2. 73. Salk 93.)

There is one exception to this - in case of Estoppel: this kind of plea neither admits, or avoids, nor denies the allegations - but shew that P^l is estopped from alleging the facts alleged by him, whether they are true or false - it is in substance this: "whether those facts are true or not is a matter of indifference to me - for at all events you have no right to make them" (Lawes 38. 80. 3 Bl 208. Wil 10. 5 East 346.)

Every plea of Justification must confess facts intended to be justified: for it would be absurd to justify what one denies - it must be expressly admitted. - (1 Samsd 28. n. 1. Esp. d. 318. 3 T. R. 298. 1 Samsd 14. n. - 3 Salk 394. Carth 380. - 1 Chy 571.)

Thus in Trespass for a battery, the Deft instead of denying, confessing, & avoiding it, justifies an act wh. does not constitute a battery - the plea is ill on special demurrer. 1 Samsd 14

A special plea in bar, always advances new special matter, and is usually in the affirmative, but not always. Deft may plead special in the negative - as where he is sued on a Court writ to do certain acts (3 Bl 209.)

And every thing thus pleaded is called new matter, except an express denial of some allegation on the other side: hence it regularly concludes with a verification, instead of closing like the Genl issue to the country: - for till a proper issue is tendered, each party must have an opportunity of answering the allegations of his adversary in either of these ways viz: 1. by denying them. 2. by demurring to them. 3. by confessing & availing them by new matter of his own - hence till that time the plead^g must be kept open (Lawes 150. 9. 1 Samsd 103. n. 2. 3 T. R. 163. n. 3 Bl 209. 10. Doug 58. Corp 575. 2 Burr 772. 3 H 1725.)

But in Eng^d. by Stat 3. Geo. 2. a Genl plea of Bankruptcy may

to pleaded conclude to the country (Lewes 114. 145-244. 7.)

Plea merely negative need not conclude with a verification, tho consisting of new matter - Deft may pray judgment without it: for a party cannot in Genl be required or expected to prove a negative (Lewes 145.)

Plea which form a complete and proper issue conclude to the country, if triable by jury - as in case of Genl & special issue taken on the declaration: for there is no need of keeping the pleas open after a proper issue is tendered: - the parties might thus continue to plead over ad infinitum. (5 Com. 86. T. Ray 98. Carth 573)

When Deft alleges distinct matter of defence to diff't parts of the declaration or cause of action, he may conclude each with a verification, or the whole with one: either method is good in plead 81. (1 Saund 338. n. 5. 339 n. 6. 1 Salk 312. Carth 413.)

All pleas admit what they do not deny as a matter of course (ante) hence Nil debet is not a good plea to debt or bond - for it admits the execution and does not avoid the cause of action in any way (4 Bac 83. 2 Ld Ray 1500. 2 Stra 778. 90.)

General
Requisites

To every special plea there are certain requisites - 1st Coke says every deft must plead such a plea as is pertinent & proper, according to the quality of his case, estate and interest" (1 Inst 285. 303. 4 Bac 83.) this is equivalent to saying that every plea must be a good one.

Every special plea must contain issuable matter - i.e. some fact which can be tried - for otherwise the plea cannot be tried: - thus if deft in Count 1st plead "that he has always been ready to pay" without more, his plea is ill: for his readiness is not an issuable fact & if it were it is no defence without actual payment (Lewes 137. 8. 2 Will 94.)

A plea containing any immaterial matter is ill. - So if a plea where Law & fact are so blended that they cannot be separated (1 Clay 379. 20) thus when one pleads "that he lawfully enjoyed the goods of felons in such a district" it was ill - for the jury could not decide on the legality of this right - he ought therefore to have shewn the special matter on wh. this right was founded (Lewes 138. 4 Co. 25a. 2 Mod 55.) a traverse of such an allegation would embrace all matters both of fact & of Law, which could go to constitute such a right.

A plea in bar to the whole declaration must answer the whole grava-
men, a cause of action: otherwise it is ill for the whole: thus in an action for assault & battery & wounding, a plea to the whole, justifying the assault & battery

only is ill for the whole, and damages will be recovered as well for the wounding as 69
the assault & battery - for an entire plea cannot be divided in its effects (Laws 135
170. 1 Saund 23. 269. n. 1. 2 ib 50. 127. 210. 4 Bac 86. Cro. El. 268. 1 Lev 16. 48. 3 ib 375. Hob 327. 8.)
Esp. D. 318. Com. D. pl. 21. Id Ray 229.)

In Resp. if a release be pleaded, all Trespasses after the release must be traversed.
for plff can prove Resp. since the release. (Hob 104. 1 T. R. 636.)

The same rule holds in all the subrept pleadgs - the replication must answer
the whole plea in bar, i.e. all that is material in it - the rejoinder must answer
the whole replication & so of all the rest (1 T. R. 40. 1 Saund 23. n. 2. 337. 2 ib 127.)

Def't may make def't answers to diff't parts of the declaration, whether it con-
sists of several counts or only one. e.g. Resp. for 10 horses: not guilty as to all but one,
and as to that one a justification - it is not meant then, that every part of the
defence must reach the whole declaration - but distinct defences may go to dis-
tinct parts - thus if a man be sued in Ass't for \$100 he may plead payment of \$50,
accord & satisfaction as to \$25 & tender for the rem^r (Laws 101.)

If matter pleaded as an answer to the whole declaration, is in Law suff't
as to part only, the plea is bad as to the whole - Thus in an action apt Bailes for
goods delivered to him to keep & carry, a plea that he was discharged from carry-
ing them was ill: for it does not answer his declaration to keep them (1 Bac 88. Hob 23.)

And every plea to the action is taken as an answer to the whole alleged cause
of action, unless expressly limited to a part: - So if matter which would be a good
answer to the whole declaration is pleaded as to part only, the plea is ill - as if
in Ass't for \$100 def't plead as to \$50 accord and satisfaction in full of the whole
demand: tho' this would be a good answer to the whole, yet as def't has pleaded
it to part only, it is altogether ill (Laws 135. 6171. Sack 179. 4 Co 62. 1 Saund 23. Cro El 268.)

So in an action of Slander for words "he is a thief and has stolen \$20", a plea that
"he is a thief and has stolen two hundred" is ill. (4 Bac 59. Cro Jac 679. 2 Roll 414.)

If the plea purports to be an answer to the whole declaration & is in Law only
an answer to part, plff may demon: for the whole is answered, but the answer is
insufficient (1 Saund 21. n. 2. 28. n. 3. Sack 179. Id Ray 331. Stea 503. Laws 135. 6.)

But if it be pleaded as an answer to part only, and is in Law good as to part only,
and not good to whole, it is a discontinuance of the whole defence, & Plff shd take
judgment as by Nil dic't (1 Saund 28. n. 3. Laws 135. 6. 4 Co 62. Sack 179. 80. Id Ray 231. 841.)
(See ser. 4. ill. c. p. 1063.)

70. The P^lff in this case sh^d not demur - for he is not bound, neither ought he, to accept an answer to part only of his demand; and de^ft is bound to plead to the whole cause of action. He discontinued his action by demurring - for by thus consenting to try the sufficiency of part only of his cause of action, he waived it as an entire right, and refers the court to the answer (1 Samd 28. n. 3.)

If the facts pleaded in the last case, to part only are in law good for the whole, it is a question whether p^lff sh^d demur or take judgment by "nil dicit". I think it makes no difference whether it be good as to the whole cause of action or not - It is not pleaded to the whole - and de^ft has waived his answer as to part, and the court will not go into the inquiry, whether it is good for the whole or not (1 Samd 28. n. 3. Lawes 1361. Selw. N. P. 4 Co 62. 2 B. & P. 427. Sta 303.)

Tho if the plea thus begun, expressly answer the whole, the P^lff may demur specially, for it is inconsistency (2 B. & P. 427. Lawes 136.)

But the rule requiring every plea in bar to answer the whole declaration, does not require such parts to be answered as are immaterial, or not of the gist of the action - as matter of inducement or aggravation; these never need be answered (1 Samd 28. n. - For a plea wh. answers the whole gist of the action, covers of course all matter of aggravation: thus in Tresp. for beating & entering p^lffs house, & battery and expelling him from it, de^ft pleads that he was a Sheriff; having criminal process ag^t p^lff and that entrance to the house was denied him: this justifies the entering & beating, and as these are the gist of the action, de^ft need not answer for the beating and expulsion, wh are mere matter of aggravation; & on this plea Judgment will be rendered, unless p^lff in his replication, make a "novel assignment" of the beating & expulsion i.e. it will not defeat the action, if the pleads go no further; and will at all events defeat it, unless the plea is destroyed by the replication (5 T. R. 292. 1st 479. 656. 1 B. 136 535. 3 Bl 311. 12. 2 Wils 20. 1 Samd 28. n. 7 Co. 62. Lawes 136.)

Novel Assignment is not correctly defined in any of the books: it consists in "alleging with all necessary circumstances (in the replication or in answer to the responsive plea) what is alleged in the declaration generally" or in "stating as a substantive ground of action what appears to be, upon the face of the declaration, mere matter of aggravation; in the former case, it is only for the sake of certainty (1 Chy 612 3 Bl 311. 5 B. & C 213. Lawes 70. 163. 197. 2 No. 2)

For form vid 2 Chy & entries under proper head (1 Samd 299. a. n. 6.)

To a novel assignment, deft may plead a new plea, as to a new declaration: thus in 71
the case before mentioned, after Plff. has made a "novel assignment" of beating and expul-
sion, deft may plead not guilty (Lanes 185. 1 Samd 299. b 3 East 295. 2 F.R. 125.)

A novel assignment must always conclude with an averment that the Tresp.^s
described in it are diff't from those mentioned in the plea: otherwise a new assign-
ment is unnecessary, and the Tresp. newly assigned would be always covered by the plea.

This averment cannot be directly traversed: deft should give issue to the novel assig-
nment and under it may contradict the averment or avoidance (Lanes 184. 5. 240. 1. 1 Samd 299. 7th)

It was formerly necessary for deft to set forth specially, all the particulars (however numerous) of a defence consisting of special matter of avoidance - to this there was no exception (Just 302. 3. 8 Co 133. 4 Bac 90.) but in later times this rule has been relaxed & genl. plead^s is sometimes allowed, to avoid prolixity. -

And the rule is that when the particular facts constituting the special defence would, if specially pleaded, amount to great inconvenience, prolixity, or as Lord Coke says, "tend to impudency", genl. plead^s is allowed: as in a case of contract to do a great variety of acts (4 Bac 41. Cro. El 749. 910. 1 Sid 215. 236. 1 Just 300. 2 Vent 257. Corp. 575. Lanes 181. 1 Samd 117. n. 1. 2 ibid 110. n. 4. 15. R. 703.) - This rule is laid down in very confused terms - half our text writers, lay it down that if a contract is in affirmative terms, performance may be pleaded generally; but this is incorrect. As an instance of the application of this rule, if a ship is sued on a bond given for the faithful performance of his duty, he may plead performance genl. for it would be morally im-possible for him to set forth on the record, every special act which he had done for years in the official capacity of Sheriff. -

But if an executor be sued for not paying all the legacies contained in a will, he must plead specially, that he has paid one legacy to A, another to B & C. & aver that these are all - So if one be sued on covenant to convey to J. T. all his real estate. -

But when the contracts are negative, deft cannot plead performance at all - for negatives cannot be performed. He can only plead that he has not done the acts contracted against (1 Just 303. 6. Cro. El 691. 1 Bac 91. 5 Corn 236. Esp. d. 305.)

If however deft does plead performance of negative covenants - it is a virtual va-
thence than a legal error, and is ill only on special demurrer (Cro. El 232. 5 Corn 82.)

All pleadg must be consistent with itself - because repugnancy in a material point radically vitiates every plea - but repugnancy in a point not material, is not

72. treated as mere ^{surplusage} ~~surplusage~~ - and unless taken advantage of by special demurrer, the exception is waived - for it is an error only in form (2 East 233. 4 Bac 94. 1 Inst 303. Lawes 63. 44. Hill. C. pl. 132. Salk 325. Com. D. Pl. 9. 1 Wils 98.)

When deft justifies under a writ, warrants or any other authority, he must set it forth specifically; alleging generally that he acted by virtue of a certain writ or warrant is not sufft, for it is matter of law, & as such must be specially shewn to the court, that they may judge of its sufficiency (Saud 298. n. 1. 2 ib 402 n. 1. 3 Mod 187. 8. 1 Inst 288. a. Salk 107. 8. 4 Mod 378. Hobb 28. 295. 4 Bac 60. Com. D. pl. 38. 17. ante)

For forms of beginning and concluding, special pleas in bar, replications &c vide Lawes 138. 145. 157. 161.) how this plea is aided by rep^r see ante Gen. issue. Com. D. Pl. 297)

of Traverse.

Traverse is a denial of some particular point alleged in the plead^g and always tends an issue (4 Bac 67. 1 Inst 282. 40. 195.)

A Traverse when preceded by special matter by way of inducement, is called a technical traverse, & according to Lawes a special one: 116. 17. 18. 21. 49.) but his distinction is not correct - a traverse may be general with inducement or special without it: the intents of the Traverse determines its character as general or special - If it denies all the allegations on the other side it is ^{general} ~~special~~ -

Bacon says that a traverse closes the issue (4 Bac 67) but this as a general rule is incorrect, tho' as an exception to the Genl rule it is sometimes true. The issue is closed (when triable by jury) by concluding to the Country - it is joined by the opposite party adding a denial: the Genl rule is that a traverse only tends an issue

A Technical Traverse is one with an "aliquo hoc" and concludes Genl with a verification - if it is also special, it always so concludes - thus deft pleads that he derived title from J. S. who died seized in fee - Plff replies that J. S. died seized in tail, "aliquo hoc" that he died seized in fee and that he is ready to verify (4 Bac 67. 8 Co 14. 5 Com 109. Sta 871. Doug 422. 1 Burr 321. Lawes 121. (Saud 103 b. n. 3.)

The words "aliquo hoc" are the words introductory to a technical traverse and are technical words of denial. But they are not indispensable. "It now" are sufficient. The Traverse is nothing more than a conclusion from the affirmative language or inducement (Lawes 109. Saud 22. 1 Chitty 576.)

A Genl traverse reaching all that is alleged on the other side, concludes in genl to the Country: thus a technical traverse in reply to a justification in tort, always denies the whole: as in an action of assault & battery, deft pleads that it was

committed in self defence, Plff replies that it was done "de injuria propria sua absque tali causa" and concludes to the country - (1 Bac 67. 3. 1 Saund 107. 6. 2. 2 N. R. 364. 1 Burr 317. Day 90. 4 R. 2. 12. 4. 7 Mod 103. 2 T. R. 437. Croac 117. 164. 5 Can 48. 8 Co 66. 138 P. 467)

This cannot be ill as being immaterial, even if all that is alleged on the other side be frivolous - for it involves the whole, and it cannot be necessary & proper for the adverse party to answer it by special matter: for it tendered an issue, and one wh. cannot be objected to by the other party as immaterial, for it extends to all that he has alleged. -

But a special traverse should conclude with an averment "ad absque tali warranto" to a plea of justification under a warrant (1 Bac 68. 7 Mod 105. 3. 12. 203.)

It seems that a general traverse may sometimes conclude with a verification as to the country, at the election of the party traversing. (2 T. R. 463. 2 Burr 1022. Saund 1230. 12. 14.) But the conclusion with a verification is indicated only by precedents wh. originated in mistake - upon principle a verification cannot be a proper conclusion for a general traverse - for as it denies all that is alleged on the other side, the opposite party cannot reply over to any purpose - and he is not precluded by the conclusion from denying ^{summarily} if he chooses to do it. The general replication "de injuria propria sua absque tali causa" is inappropriately adapted to matters of excuse, and applies peculiarly to cases of Tort (Laws 154. 6.) thus it is a good answer to a justification containing matter of fact and not matter of Law, as words, right, title, an interest (Laws 155. 8 Co 7. Com D. R. f. 201) - for the denial of these is altogether defective - as it does not separate the mere fact from the matter of record (Laws 154.)

But the replication "de injuria" is, concluding with the general traverse, "absque tali causa" is not proper where the ground of the plea consists of matter of record, & yet even in such case, Plff may reply "de injuria sua propria &c." and conclude with a special traverse of any one material fact or point in the plea by itself: as denying, the existence of the record - for this avoids the duplicity of the general traverse by separating the matter of mere fact from the matter of record: whereas "absque tali causa" traverses all that is alleged on the other side (Laws 154. 6. 8 Co 7.) thus if deft in false imprisonment pleads that he was a Plff, and had legal process for arresting plff, a general traverse that the arrest was made de sua inj. absque tali causa is ill - for it denies both matter of fact & Law - It should specify to traverse some particular fact, as that deft was a Plff or that there was such a writ. -

But where matter of record, title be is alleged by way of inducement only, the traverse "de iuribus" may be replied in its full form: for then this matter of Law is not distastefully traversable, not being parcel of the issue (Laws 158. Com. D. R. f. 20. Burr 320. 8 Co. 7. a.)

A Technical traverse wh. is always preceded by matter of inducement, begins regularly with an "alioquin hoc", and is different from a direct & positive denial by a common negative, not only in diction, but Genl in the conclusion.

There may be a Traverse without an inducement or an "alioquin hoc" when the party tendering the issue has no occasion to introduce new matter (2 Saund 206 a. id 103 a.) This forms a complete issue & is of itself sometimes called an issue, as distinguished from a traverse technically so called. (Laws 117) It usually concludes to the country, whereas a technical traverse concludes with a verification: thus Deft pleads that he is alive alioquin hoc that he is dead "and thus he is ready to verify; or in the more simple form "that he is not dead, & if this he puts himself on the country, for trial 44 Bac 67. 77. 1 Burr 321. 2 St 1022. Ray 78. 2 T.R. 437. 2 St 871. Laws 8. 116. 145-7. 2 N. R. 384.) Whether a wrong conclusion in these cases, i.e. a verification instead of concluding to the country, or vice versa, is ill on Genl demurrer, or only on special, the books are not entirely agreed - It would seem that at Com. Law it was ill on Genl demurrer (Ray 94. Cro. Car 117. 144. 1 Vent 240. 3 Mod 203. 1 Saund 103. 6) But by Stat 405 Anne c. 16. it is made a mere error in form, and is ill only on special demurrer (2 Saund 190 n. 5. 1 St 103. 6 n.)

When an allegation on one side is expressly denied on the other in comparative language, the superadding of a technical traverse, is not only unnecessary but improper & demurrable - Otherwise the party might continue to answer over in infinitum: thus if one party pleads performance of a covenant & the other replies that he has not performed it, alioquin hoc that he has performed it, the traverse is improper, for a complete issue was formed without it 44 Bac 67. Laws 117. 2 St 870. Cro. El. 755. 1 Vent 107. Ray 78. 2 Saund 188.)

Averment is used on the subject of the conclusion of pleas in the same sense with a verification - it refers to the averment, "and thus he is ready to verify."

when necessary -

It is a Genl rule, when one party alleges new matter, which is inconsistent with any antecedent traversable fact on the other side, i.e. whif if found either way on issue joined would be decisive, but wh. does not form an issue, a traverse of these allegations is not only proper but necessary - for otherwise the parties might

answer in infinitum without forming an issue: thus one pleads that his co-deft was dead at the time of the date of the writ; plff replies that he was alive - he must add an "alogue hoc that he was dead". So if deft avers that ch. died seized in fee, and plff replies that he died seized in tail, he must traverse that he died seized in fee 4 Bac hy. 88. 70. 2y 365, per 213 Lawes 117. 18. 130. 1 Will. 258. Holt 103. 3 Blk 310. 1 Samsd 22. 2 it 207. 6. n. 209. 11. 1 Sid 381. Co. 22 50. 2 Mod 88.

But to this rule there is an exception, whenever in answer to a negative allegation, it is necessary, for the party to set forth affirmative matter specially to make out his case or defence, he cannot conclude with a traverse of the negative allegations, tho' this new matter is inconsistent with it: thus in debt on an obligation bond, if deft pleads no award, plff may reply that there was an award, setting it forth, and assigning a breach - but he does not traverse the plea tho' his allegations are inconsistent with it - for he must plead the new matter specially to make out his own case of action, & he must leave it open of course, until answered by deft. (1 Chy 187. Lawes 130. Holt 233. 6 East 556. -

The new matter wh. precedes the traverse is called the inducement of it (Lawes 113.) It is said (ib.) that a special traverse must of course have a proper inducement or the issue will be a negative pregnant. (Lawes 118.) thus if a defendt in an action for battery pleads that he is plff and having legal process he usually laid his hands upon him, for the purpose of making service, plff replies that he committed an outrageous battery, alioque hoc that "inanus molle inposuit": here the inducement is necessary - for if plff shd only reply without inducement, that deft did not gently lay on. ~~this~~ negative might imply the affirmative that deft did not lay his hands upon him at all. But if the plea were that ch. was dead, replication that he is not dead is sufficient without inducement: and from this last example it appears that

The above rule is by no means universal: - it is necessary to see first whether the traverse will be a negative pregnant without inducement - if so, inducement is necessary as in the last example. The rule holds genlly only when the traverse taken by itself includes circumstances or particulars that are not material - in wh. case inducement is necessary to limit its extent and application (Lawes 121. 2 Samsd 188. 9 it 103. 6. Will 381. 2y 280. 312. 70. 1 Boty 244.) as deft pleads usury 10 per cent. plff replies not 10.

When a party merely confesses and avoids by new matter of his own, which is alleged on the other side, a traverse is unnecessary and improper - for what he assigns is not inconsistent with the other's allegations - a traverse would make his

pleading, rebuttal - for there would be an admission in the inducement and a denial in the traverse - thus left pleads infancy to an action on a promise. plff replies that there was a promise after full age - he must not add "why, how that he was an infant, for his replication has admitted that he was so It fish (2 Bac 70. Co Llc 384. Gels 150.1. Co Llc 221. 2 Mod 168.) the replication in this case, as it contains new matter, must conclude with a verification (3 Bde 309. Lawes 118. 1 Mil 203. 1 Sand 22. n. 204. n. 5 ib 204. n. 2 ib 5. n. 3.)

It traverses however, in such case with on special demand only; for it alleges
a new matter, and is good except in form. (6 Co 24. 16 anct.)

"A traverse preceded by an inducement, when both go to the same point, is a mere conclusion from the facts of the inducement. e.g. I. S. died seized in tail, absolute fee, that he died seized in fee i.e. he died se. ago he did not die seized in fee.

When a traverse with a verification is tendered, the issue is formed by the opposite party affirming over the matter, and concluding to the country - thus in the traverse last mentioned the opposite party did reply that L. I. did seize in fee & conclude to the country (4 Bac 67. 8 n. See Kt. 1 Inst 126. a. Lawes 146. 124.)

The rule laid down by Lord Coke, that an issue joined with an *absque hoc*, ought to have after it an affirmative is often misunderstood - "after it" means after the *absque hoc* - not after the issue (1 Inst 126. a. 4 Bac 88. v. more clearly thus) - A negative allegation cannot be traversed with an *absque hoc*, for it must be traversed with an affirmative otherwise the traverse would consist of a double negative (Calver, 124. 1 Chy 587.) e.g. plea that J. S. did not die seized in fee, *absque hoc* that he did not will the premises to the plaintiff.

The omission of a traverse when necessary is said to be matter of substance, & is so at com. law (4 Bac 70. 2 Mod 60.) but by stat 4 G5. Ann It is reduced to mere form (1 Saund 103. b. 1 Leon. 43. 4.)

If a defect in traversing, puffs title shows a defective one in himself, his plea is bad (Conn. D. R. 4.20. Lawe, 18. Cr. Car 336.)

It is a general rule that there cannot be a traverse upon a traverse* when the first is material - By this is meant that when one party has tendered a material traverse, the other cannot leave it to take another ^{upon the same point} to the same point & to the same ground of action or defence. 4 Bac 67. 3. 73. 9. 1 Inst 282. Holt 79. 102. 5. Com. Di. Pl. 17. 2 Mod 183. 14. 15. 403. 1 Clcy 597. a. 9.) e.g. deft pleads that S. was seized in fee - plff replies that he was seized in tail, without this de. nor deft cannot

take another "abque hoc" that he did seized in tail - for in this way they might and ⁷⁷
answer one eternally. - th A traverse upon a traverse is a subje^t one going to the
same point as is embraced in a preceding traverse on the other side.

But a traverse after a traverse is good even tho' the first is material (4 Bac
73. Hob 104. 1 Inst 282. b. 5 Com 121. Polk 101. Com. Di. pl. g. 18. 1 Chy 335. 2 id 265.)
By this I meant one who does not go to the same point or same ground & claims as
is embraced in the first (Hob 104. 1 Chy 335. 2 id 265.) e.g. to Tresp. de^{ft} pleads license
on a particular day and traverses as to any trespass before or after that day - here
plff may join in that traverse and lay a trespass on another day, or he may traverse
the license: for here the Tresp. denied is one thing & that justified another. (Hob 104. Com. Di. Pl. G.)

But the more simple and better way in such cases, is for de^{ft} to plead spec^{ly}
only as to the fact justified or denied, and the legal issue as to the residue: thus in
Tresp. de^{ft} may plead, as to any trespass before such a day, release; as to any since
not guilty. - 1 Chy 305.

There are two cases in which there may be a traverse upon a traverse - viz:
I when the first traverse is on an immaterial point, the other party may pass it
as a mere nullity & traverse the inducement: thus in trespass for cutting & selling
a man's timber trees, if de^{ft} plead that he cut them by plff's order & applied them
to plffs use "abque hoc" that he sold them, plff may take no notice of this traverse
and traverse the inducement - for the selling is wholly immaterial: - or he may
demur to the immateriality of the first traverse (4 Bac 73. Hob 104. 5 Com 120. 1 H.
Bl 376. 406. Sta 117. 1 Inst 282. b. 780. id 99. Carth 116. 1 Samd 22. n. 1. T. R. 440. 6
Co 24. 1 Samd 21. n. Cio 121. Gelo 157.)

II. In case of a false foreign plea: as when in Tresp. laid in the County of
A, de^{ft} pleads a local justification in another county (as that he was plff of B
and had legal process against plff) with an abque hoc that he committed it in A.
- The justification being local, plff may leave the traverse tho' it includes what
may be material, and traverse the justification: So if the justification is false
the plea is immaterial, and if plff would not in such case leave the first tra-
verse & take issue upon the inducement, he might be deprived of his right in
choosing his venue in transitory actions, by the false pleads of the de^{ft}. thus
suppose that in the case stated the trespass was committed in B. but in A, still
plff has a right to sue and recover in A: this exception to the local rule is necessary

to defeat foreign pleas when false. (1 Chy 577. Com. Di. Pl. G. 18. 45 R. 239. 5th 36. 7. 1 H. 132 403. 2d 182. 4 Bac 73. Poph. 191. Co. 2l 99. 418. Luter 1147. Co. 105. 1 Saund 22 n.)

But a better mode of pleading in this case would be "Not Guilty" as to A. and the justification as to B. —

When the matter alleged in the declaration as to the cause of action, is in its nature divisible, so that Plff is entitled to recover for as much as he can prove — the deft cannot make that part of his plea wh. is an answer to part only of the cause of action, an inducement to traverse of the remainder: thus in debt for \$100, deft cannot plead payment of \$50. wh. was the whole debt alq. hoc that he owed any more: as to the remaining \$50 he shd plead the Genl issue (Com. Di. pl. G. 20. 1 Saund 267. 9. Lower 118.)

Yelo 225. — For supposing, the traverse to be true, plff may have a right to recover for the fact not traversed i.e. for the original \$50. But if he were obliged to join in the traverse he would be precluded from denying the payment & thus from claiming for that part — a suppose allegation of payment & traverse both false i.e. no payment & no debt above \$50, in this case if plff joins in the traverse as he must do if it is good, he cannot in evidence contest the false allegations of payment as before — and if he might & should traverse the alleged payment, he could not under that traverse go into proof that deft owed more than \$50 — if then the plea was good, he could in no possible way answer it without prejudice; tho it was utterly false; — the plea is ill for cause. —

So in an action on the case for obstructing ancient light: if deft justifies as to two alq. hoc that he obstructed three, his plea is bad — he shd plead Genl Issue as to the one not justified: — in these cases assuming that the inducement is true, the traverse is material & therefore a good traverse — still it is not good — if it were plff wd be obliged to join in it, and would then be precluded from answering to the part covered by the inducement — 3^o the party to whom a traverse is tendered does not by joining in it, admit the new matter alleged by way of inducement to be true — for when he is obliged to join in the traverse, it would be a hard case to make him also admit the inducement — in this way he might be defeated by false inducement. (4 Bac 68 n.)

indeed when the inducement and traverse are properly adapted to each other and go to the same point, joining in the latter implies a negative of the former, for the traverse is but a conclusion from the inducement. In such case, the party joining in the Protesta Traverse may enter a protestation, to avoid the effect of admitting the inducement. — or any further question (4 Bac 68.) But the protestation can answer no purpose

But when they go to diff't points, joining in the traverse admits the inducement.

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the subject of

in the case in wh it is used - for it is not in issue, and in strictness is no part of the
pleadg: pro answer therefore is necessary to a protestation (Lawes 141. 2. Com. D. Pl. n.)
Hence the protestation seems unnecessary, since the allegations to wh. it is taken
could not be denied by pleadg. -

But the party tendering the traverse admits of course what he does not traverse: -
for he is at liberty to deny what he pleases (4 Bac 2. 73. Salk 91. 117. 338.) - to him,
therefore a protestation may answer some purpose.

It may also avoid or exclude any such admission (so far as it excluded respects any
future claim in another suit by Protestation. - This does not oblige the other party to
prove the allegation (to prove the allegations) protested agt, but as to the principal
cause it admits them. (Lawes 141. 3. 2 T. 2 141.) It merely prevents the record from
being evidence in any future cause, agt the party protesting, as to the matters
to wh. the protestation extends - hence it is defined by Lord Coke to be the exclu-
sion of a conclusion (1 Inst 126. 3 Pl 311. 4 Bac 73. 2 Burr. 1023. 5 Mod 736. Litt sec 192.)
This is the only mode of denying those allegations wh. cannot be put in issue.
(Lawes 141. Nov 2 76. 6. Com. D. Pl. n.)

Repugnancy or other defect however gross, in the protestation, does not vitiate the
pleadg: for it is in strictness no part of the plea but an exclusion of a conclusion.
And in genl a protestation does not avail the party if the issue is found agt him.

Matters wh. might be excluded by protestation, may if not so excluded, conclude
the party in future controversies, tho' the issue be found for him - for it appears by
record to wh. he is a party (Lawes 141. Litt sec 122.) And is it a subject of demurrer? no. 2 Inst 141.

A traverse can only be taken properly, on a material point, i.e. one decisive
of the cause - for it would be to no purpose for the Jury to find a fact wholly imma-
terial (Lawes 113. Roll 324. 5. 2 Saund 528. 6 Co 24. a. Carth 217.)

If however, the adverse party will demur to it as being immaterial, his demurrer
by Stat 37. El. 584. & Ann 16. must be special. At Com. Law the immateri-
ality of a demurrer traverse is reached by genl demurrer (Yelv 195. 2 Saund 207. a. b.
1 do 14. m. 21. n. Sta b 94. 2 Saund 319. a. b.) for 37. El. vid 4 Bac 133. 1 do 94. 5. Contra Sta. 817. 13.)

On this subject there is a diversity in the books, from want of distinguish-
ing between the rule as at Com. Law, and the one made by those States. -

If a party to whom an immaterial traverse is tendered, joins in it and ver-
dict be found agt him, judgment will regularly be arrested and a lepleader

was said; tho' as the case may be, the verdict would be good: for in some cases, on issue if one way would be decisive of the right, when if found the other, it would not; it is a good cause of demurrer that the verdict if found will be unavailing (Carth 371.
2 Saund 319. a. n. b. 1 d. 228. n. 1 Co Sac 434. 589. Talb 596.)

Qu. Can the verdict if for the party traversing, ever be good, except when the issue is immaterial only? as being a negative pregnant, I think not, but always then.

A traverse can be taken only on an issuable point: every thing material is not of course distinctly issuable, as the consideration in Ashby's Matter of Law then, because material, cannot be traversed. e.g. "prout a bene licuit" in a justification - thus a deft in assault & battery pleads that he was Shff having lawful posse apt p^lff & under it he arrested p^lff as by law he had a good right to do - This averment then "as by law &c" cannot be traversed (2 Bl R 776. 3 Wils 334. 1 A Bl 182. Saund 23. n. 5. Plowd 231. a) he must know fact of his being Shff.

For generally can matter of character be traversed: as in slander, the averment that p^lff has always sustained a good character (4 Bac 68. 81. Lawes 46. Co. 1129. 11. Co. 8. b. Com. D. Pl. 15. 157. 14. 1 Saund 268. a. 222. d. 2 d. 159. 3 Mod 320. Doug 157. Latch 111. Talb 626. Co Car 442. Holt 103. 1 A Bl 376. 403. 2 d. 182. Co Sac 221. Plowd 231.)

Whether a per quod or virtute cujus in a justification: as when deft in false imprisonment, pleads a writ per quod a virtute cujus he arrested p^lff - p^lff cannot say that the arrest was not made by virtue of the writ: for the per quod &c is only a conclusion from the facts stated - But in such case the issuing of the writ may be traversed (1 Saund 293. n. 3. 22 n. 5. 1 Kelt 809. 3 d. Roy 440.)

A traverse may be taken on a precise averment which being made becomes material, tho' not necessary to be made (2 Saund 206. a. 7 a. 1 d. 346. Selw 195. Doug 440.)

A traverse must be taken on a single point only, i.e. a single general claim a defence, or it is bad for duplicity - but this point need not of course consist of a single fact (4 Bac 68. 3 Lev 40. Burr 320) provided they all constitute one ground of claim & def.

But if there be two distinct material facts, either of them may be traversed tho' both cannot (1 B & P. 40. 8 Cobb. Bull. N. P. 73. Lawes 152. 3. Chy 377. Com. d. ply 10. Lawes 48. b. Co. 24. b.) The language of Lord Mansfield as made to apply to the rule in Burr is incorrect - the question was not whether the beasts were commensurable, but whether on the facts in that case they were entitled to common.

Nothing can be traversed that is not alleged or necessarily implied

and the fact of his being Shff -

5 J. 2 56.

11 Co. 10

1 B & P. 30

8 Co. 56.

Pr Bull 93

11 Wils 320.

on the other side: this is apparent from the very nature of the traverse, wh. is a de- 81
nial on one side of something averred on the other: and a denial of what is not al-
leged tends to no issue. E.g. in an action or a promise to pay money for another
not averred, blain writing, deft cannot traverse that it is in writing, tho it is
within the stat of frauds - for that stat only prescribed the writing as a mode
of proof (1 Saimd 312. n. 4. 206. 2 ib 10. n. 14. Salk 298. or 269. Com. Dig. pl. G. 8. 13.
4 Bac 81. 68. 75. 1 Roll R. 235. 2 ib 37. 2 Vent 79. 2 Mod 67. Salk 298. 6289.
Carth 99. 2d Ray 64. 2 Burr 994. Esp. d. 225) there is one instance in wh.
a party is bound to traverse what is not averred - but that is an ^{anomaly} see post 2 pages.

A traverse in the instance given above, is ill only on special demurrer
by stat 27. Eliz. 8485. Anr c. 18. - for in that case tho the ^{denial} (traverse) is in form
of a ^{traverse} ~~denial~~ it is in substance tantamount to an averment, that there is no
note or Mem^e in writing (4 Bac 75. 2d Ray 238. 1 Saimd 312. c. n. 4.)

Any material fact appearing on one side tho in form of suggestion or induce-
ment may be traversed on the other (Laws 48. 2 Saimd 266. n. 12. Com. Dig. pl. 11. Cro 22 169.)

When a party justified, or in any way confesses and avoids as to part only
of the cause of action a defence alleged agt him, his traverse or other answer
must be co-extensive with the part not thus avoided - for all the parts are
necessary to constitute the whole, and if the declaration be answered in
part care must be taken to cover all the parts (Holt 104. 2 Mod 68. 1 Sid 293-4.
4 Esp. 415. Salk 222. Cro 22 87. 1 Lev 240. 307.) this will appear from an
example. Thus, if a deft in Tresp. pleads release, he must traverse or otherwise
answer all other Tresp. subject to that one i.e. all not covered by the release.
If he pleaded feffment, all antecedent trespasses must be traversed - if a
license at a particular time, "all before & after": otherwise a part of the cause
of action remains unanswered: the more proper way however is to plead the
kind issue as to the facts not avoided (1 Chy 534. 2 ib 379. 2o n. y. 657.)

To the two last examples given above, there is an exception, in case the
justification is laid on the same day, that the Tresp. is alleged to have
been committed: for the day is thus agreed by the parties & the trespass just-
ified is upon the face of the pleadgs identified with the one complained of.
(5 Bac 206. 2 Saimd 5 a. b. 295 c. 1 ib 14. 3 Salk 42. 1 Bulst 138.) Carth 281.

If feff in the last case relies upon a Tresp. committed on a diff't day, he

must make a "novel assignment": and if the fact shd be that a Tresp. diff't from the one justified was actually committed on the same day, it might properly be newly assigned. See 2^d Lin. whether a Tresp. of the "quo est, cadem" would be suff'ed? (Co. Car. 165/114-15. Bull. N. P. 17. Ray 86. 4 Bac 125. 3 Bl 812.) 1 J. R. 636.

If a Tresp. is laid on a certain day and ~~denies~~ other days" It seems that a justification complete as to that day is good for the whole (2 Samd 5 a. b. 13d 636,) it is difficult to conceive how deft could justify & free in any other way.

If Tresp. was committed on any other day, plff may newly assign. - But in all these cases of special justification as to part, and a traverse as to residue, the more simple way is to plead bene issue as to the part not justified, traversing before and after the day.

Justification (ut supra) is not necessary it seems, if deft avers that the acts justified are the same as those complained of - this is the Court's practice. (1 Samd 298 n. 214 n. 2. 5 Bac 207. 1 Bulst 138. Co Car 228. 165. Lawes 200. Sack 84 2 Samd 56. n. 3. Co 22 617. 3 Lev 277. Cowp 161. Lutw 1457.) Contra 1 Vent 184 2 Hobb 888. Stra. 694.) The weight of authority in favor of the practice is very great, even if it be incorrect, it is only an error in form.

As a Traverse well tendered obliges the opposite party to join, where the inducement and traverse go to the same point (as they almost always do) it is often asked of what use is the inducement in such cases? in many cases indeed it is of no use, and a direct denial in common negative language would be better, as being the more simple mode of bringing the pleadings to an issue. - But it is necessary in many cases, to prevent a negative pregnant, by regulating & limiting the traverse as in the case ante, of "nulliter manus imposit." (Lawes 118.)

II Also when used by way of protestation for the purpose of preventing the party from being concluded in any future case; - in other cases when the traverse and inducement go to the same point, the inducement is unnecessary. III Where they both go to different points, the inducement is as necessary as the traverse itself. - thus in case of justification as to one day, and a traverse as to all other days before and after wth. the inducement is a necessary part of the defence - for the traverse alone is an answer to part only of what requires an answer. -

Inducement must consist of issuable matter, otherwise the plea is demurrable. (4 Bac 68. 2 Leon 32. Co. Car. 336.) this rule has been made the subject of

ridiculous for why is it asked need the inducement be iduable, when there cannot be taken upon it? But when the inducement and traverse both go to the same point, as they usually do, the traverse is a mere conclusion from the inducement and cannot itself be iduable, unless the inducement be so too. and if they go to diff^t points, the inducement itself is iduable; and therefore the matter of it must be so (Holt 104. ante)

Generally a traverse pursues the terms of an allegation traversed, merely inserting a negative: but this will not always do - for in some cases it will be too precise and amount to a negative pregnant. Thus if a deft pleads a release since the date of the writ, plff must not reply, that it is not his deed since the date of the writ - for that would be open to the implication that it was his deed before the date of the writ. - So if a tender pleaded at such a place, where no place is fixed by the contract, and a traverse of the tender at that place. (4 Bac 98. 1 Inst 120. a. 303 a. 1 Saund 268. g. 1 Root 88. 6 Bac 261. 1 Sta 493. 2 ib 305. 7. Com. D. Pl. 2. 5.)

In these cases plff shd traverse "modo & forma" (Lames 114. 2 Saund 319. m. b. 2 Lator 12.) These words are always safe - If the time & place are material these words deny them - secus ubi -

In one case a party must traverse what is not, as well as what is - alleged viz. If to an action for money payable "on or before such a day, plff pleads payment before that day, plff in reply must traverse any payment "on that particular day or before or after"; but should not demur - for a payment at a before the day is good according to the contract (2 Burr 944. 4 Bac 66. 2 Will 173. 1 Sta 994.)

The plff must so traverse as to assign an absolute breach. (3 Pl. 395. 1 Saund 319.) sed vide 2 Burr 944. 40 Jac 434. 2 Ld. If this were found for Plff would not aie pleader be awarded? Lenth J. G.

But if the cont be to pay on a particular day and deft pleads payment on that day, plff may traverse "modo & forma" for that only makes a complete performance of the cont (1 Sta 994.) But a negative pregnant is aided by verdict, by that 32. Hen. 8. c. 30. and is ill if it is said in special demurrer only (4 Bac 98. 40 Jac 87. 2 Ld. 670. 2 Saund 319. n. c. 1 Lill 60. 153. 1 Root 88.)

And if an obligation is payable on a day certain deft should not plead payment before that day even if the fact be so - But payment on the day and proof of payment before will support the plea (2 Will 150. Burr 944. Com. D. Pl. 2. 37.)

A traverse as usually taken is followed by the words "modo et forma" but they are not essential, and the omission of them is not ill even in special demurrer. -

It is however safest to retain them as they are universally used (Laves 120. Com. D. Pl. 6.1.) For a synopsis of the rules of a traverse vide (Samm 22. n. 2.)

Duplicity. Duplicity is a fault in all pleadings - the very object of pleading is to bring the controversy to depend upon a single point either of fact or law, & when one fact constitutes a complete answer, the rules of C. Law will permit nothing additional. (1 Samd 317. C. n. 3. 2d 101. 1 Inst 209. a. 4 Bac 98. 3 Bl 311. Com. D. 36. 55. Hob & Kelt 295. Laves 27. 107. 31. 2. 152. 2 Vent 47. 8.) The object of the rule is to avoid unnecessary prolixity, confusion & vexation (4 Bac 109. Plowd 194. Gelo 113. 1 Vent 77. 8.) for the party defeated must pay cost according to the length of the record. -

A double plea & one wh. consists of several distinct and independent matters alleged, to the same point viz. the same ground of defence or claim, and requiring different answers; or rather wh. alleges several distinct and independent matters to the whole & to one & the same part of the claim or defence (5 Com. 65. 1 Inst 303. b. 38 a. 4 Bac 13. 1 Samd 336. 7. 3 Salk 142. 1st 180.)

But giving different answers to different parts of the declaration or rather pleading does not constitute duplicity - if it did a party might often suffer for want of any one defence sufficient to answer the whole cause of action - thus genl issue may be pleaded as a part of the declaration, and special matter in avoidance of another part. - (Laves 101. 103. 1 Inst 354. a. 4 Bac 118. 19. 127. Salk 180.)

And so, even at com Law, if there are several depts, each may plead a single matter to the whole; or diff't matter to diff't parts of the declaration - otherwise plff might by collusion with one dept, prevent all the rest from pleading at all. - (Laves 132. Holt 70. 2 Sta 610. 1140. 1d Rayn 1372. Esp 414. 420. Gelo 13. 1 Sta 610.) & that there may be as many pleas tho' different in their nature, as there are depts: for if A & B are joined as depts & can't be compelled to join in B's defence, and as each may plead severally, so each may plead separate defences to dep. parts (1 Esp 47. 1 Samd 209. a. b.)

It has been decided in Mass. that in an action on contract agt two depts, they cannot sever in the pleadgs. In the case where this was decided, each pleaded the same defence for himself, and to such case the rule must be confined. (6 Mass. 444.)

Under this doctrine of duplicity it is a genl rule that every plea must be simple, entire, connected and confined to a single point, claim or defence (3 Bl 311) - thus dept in contract cannot plead in the first place that the contract was never made & that she was a feme covert at the time of making it: or that

she was an infant, or that it was obtained by duress &c. - for either of these is a sufft answer. But this point need not consist of one single fact - many connected facts may be necessary to constitute one complete ground of action or defence - thus in pleading an award all the particulars must be set forth (1 Bac 320. 2 Bl. R. 1328. 4 Bac 68. 120. 1. 3 Salk 429.)

So in pleading probable causes in an action for malicious prosecution, deff may allege all the circumstances which go to constitute it (Esp 533. 4. Co. El 134. 871.)

So if an officer having arrested a person on suspicion of felony without warrant, is sued for false imprisonment, he may set out all the circumstances which gave ground for suspicion (2 Hawk 121.) for they all go to one point viz, reasonable ground of suspicion, and the replication "de son tort &c" answers the whole. Indeed the plea does not admit of distinct answers. - But if he relies on distinct acts of plff, he can allege only one which itself constitutes the ground of defence. (Esp. 535. 6.)

In such case joining another matter of defence will make the plea double: thus if deff pleads that when he arrested plff, he was in the act of committing a breach of peace, he cannot add that he was also committing a felony. -

Where the particular fact relied on is a consequence from another fact, both may be alleged: thus in an action agt an admiral, he may plead "plene administravit" and so "nothing in his hands": here one fact follows from the other, so that there is no duplicity (Com. D. pl. 32. Plowd 140. a. 1 Davr 320.)

Distinct counts in the declaration, each count being in itself single, whether intended to establish one right of action or several, do not constitute duplicity: for each count always appears on the face of the declaration, to be for a distinct cause of action - thus there are sometimes 12 counts in the same declaration. -

But when difft parts of one count require different answers, as where difft causes or grounds of action are inserted in one count to establish one & the same right, the count is double (3 Bl 295. 6.) & void if they do not require difft answers

Here Surplusage does not constitute Duplicity - as when there are two defences one of wh. is merely frivolous or not issuable, it does not vitiate the other - but the court will order it to be struck out at the expense of the party pleading it: - for "uttle per inutile" non vitiat (4 Bac 119. 1 Sid 175. 1 Kelt 661. Dy 42. 6. 2. Will 376.)

Duplicity in the declaration consists in unnecessarily joining in one count, distinct grounds of action of different or even of similar kinds, to enforce one right of recovery. - (1 Vent 365. Co Car 20. Com. Di. pl. 638. abt gth. action g. 2d Ray 404. 2 Vent 198.)

But in debt or bond, the assignment of more than one breach is duplicity at Com. Law - it is wholly unnecessary - for one work a total forfeiture, and any number can do no more, and will not therefore be allowed. (1 Bac 544. 4 M 134. Com. di. pl. l. 33. 3 Salk 108. 1 Wms 184. 26. 1 Roll 112. 2 Vent 198. 222. Com 297. 2 M 267. Lawes 25. b. 7. a 257. 7.) This rule has been varied by Stat. Law. -

Still in the action of covenant broken, plff may at Com. Law assign as many breaches as he pleases, or as the nature of the case admits - for instead of recovering for an aggregate sum, as in a bond, he recovers only the actual damages; so that he can recover no more damages than he named under breaches of the covenant, and he can prove no other breaches than those alleged; and in this case the diff't breaches are not alleged to the same point (as the breaches of a bond are to the forfeiture of one & the same penalty) but to have distinct grounds of damages occasioned by the same breach, so that they do not constitute duplicity (4 Bac 134. Com. Di. pl. c. 33. 1 Bac 544. Co. Car 120. 76.) vid. Title covt broken.)

In Com. any number of breaches may be assigned on a penal bond without duplicity, for here as in covt broken at Com. Law, actual damages only are recovered on a bond (Stat. Com. 27.) and the rule is now the same in Eng^d by Stat 849 Wm. 3 (85. R. 126. 459. 2 Bl. R. 1076. 1111. 2 Burr 320. 2 Wils 377. Com 337.)

Now in Eng^d by Stat 485 Aven debt may with leave of the court, plead to one action, as many distinct defenses in diff't pleas (each being single) as he pleases - (4 Bac 121. Lawes 27. 8. Esp 249. 3 Bl 303. Id R. 1099.) similar rule in Com 1815.)

But Stat 485 Aven comprehend only plead to the declaration - hence debt may not plead two rejoinders to one replication - nor plff two replications to one plea in bar (4 Bac 121. Com. di. pl. l. 2. 2.) Com. Law contin.

By Stat 27. Eliz. Duplicity can be taken advantage of on special demurrer only. - It is an error in form - when in substance - for the complainant is not that there is no title alleged but too much - and the duplicity must be specially assigned - the party must "lay his finger on the very point, and shew specially wherein the duplicity consists." duplex est et caret forma" is not suff. (4 Bac 119. 2 M 134. 1 Saunders 337. Com. Di. pl. l. 33. & 2 Salk 219. d. 678. Id Ray 332. 798. Lawes 132. 3. 1 Chy 646. Co Car 14. 20. 1 Wils 269. (Co R 910 contd.)

But if two distinct and suff't answers are given on one side to what is alleged on the other, and the pleadgs not demurred to for duplicity, the other party must answer both facts or his answer will be duplicative (or defective?) He may traverse both and

the traverse will not be double. The traverse of each must be single, i.e. confined to a single point (4 Bac 119. 1 Taunt 272.) he ought to demur.

The rule requiring demurres for duplicity, to be special, does not apply to cases in which the plaintiff joins in one declaration different causes of action (which according to the rules of pleading cannot be joined) as distinct and substantive grounds of recovery: e.g. assumpsit &c. over in two counts - this is not duplicity but misjoinder, and is incurable. (Salk 10. Ray 202, 5 Selw 99 4 Bac 11. 15. R. 276. 8 Co 87. Comb 33.) That Ann do not warrant double pleads in abatement. -

Of Pleadings and Oyer.

It is a general rule at Com. Law, that when a party declares upon a deed or other instrument, and makes title under it, (i.e. founds his claim or defence upon it) he must make perfect oyer, i.e. must aver in his pleadings that he brings it into Court (3 Bl. 8. 11. Com. D. Pl. o. Lawes 96. 7. 3 Bl. Appx. 22.) This is done that the Court may inspect it, and that the adverse party may have oyer and a copy of it. (4 Bac 117. 19. 6 Co 38. 10 ib 93. Holt 233. Com. Di. pl. R. Lawes 96.) for a deed is matter of Law, and as such ought to be investigated and weighed by the Court. -

The adverse party, when entitled to oyer is supposed to be unable to plead properly without it, and is not bound to do it - but if he does plead without it, he waives it (4 Bac 113. 6 Mod 288. Salk 109.)

Pleadings are required of no other instrument than a deed - It is never made in England of a bill of exchange or promissory note - for these are not deeds or instruments on which the action is founded - they are merely the evidence of the verbal promise alleged. - The com. law makes no distinction between a verbal contract & a written one not sealed - the law recognises but two kinds of contract, simple & special - a special one is by deed under seal - a simple contract is one by word or written but not sealed (Chy. Dills 185. Bull 243.) In practice however, the Court will order a copy of such writings to be furnished to deff if he demand it. -

In Com. notes of hand not negotiable, and all other writings containing express stipulations are considered as deeds. - e.g. writt agree to pay another debt with't com.

If a right acquired by deed, will pass without deed he who claims right under it, is not obliged to plead it, & of course need not make perfect of it. the assignment of leases is good at Com. Law without deed - hence in pleading the assignment, the party need not shew that it was by deed, even tho' the party was bound by contract not to assign without deed. Recd if the right could not pass without deed. -

4 Bac 110. 1 Co 38. a. b. 1 Bulst 119. Co. Car 145. Sil 457. 1 Saund 9 a. n. 37 R. 106.

But tho' title might pass without deed, yet if the party pleads the deed, and makes title under it, perfect must be made 4 Bac 110. 2 Mod 64. Lawes 97.

Yet if he pleads the deed without making title under it, perfect is unnecessary; as where it is used as mere matter of inducement, and is not made the ground of action or defence: for in such case it does not admit of a distinct answer & defence, and of course offer of it is unnecessary: - and, for the same reason, there is no use in making perfect. (37 R. 573. 10 Co 92. 6 b 38. a. b.) 2. g. in an action on the case for fraud in the sale of goods, the bill of sale being pleaded as inducement, perfect is useless.

So a stranger may plead a deed without perfect, tho' he derive title from it - for it is presumed not to be in his power: thus if A grant to B, & B to C, C in making title may find it necessary to plead the deed from A to B, as well as the one from B. to himself - But he may plead the former without perfect. (10 Co 94. 1 Des 394. 4 Bac 111. 2 Nov 4 13. 3 Lev. 30. 2 Mod 370. 1 Saund 9 a. n. Plowd 149.)

So generally any one who acquires a right by Law (operation of) may plead to the person under whom he claims, without perfect; as in case of a deed to the Husband pleaded by the widow in writ of dower: for then the deed is in the hands of the heir at Law 4 Bac 110. (Just 225. Jenk 305. 8 Co 75) contra as to tenant by curtesy, pleading deed to deceased wife: for he is entitled to all the lands for his life, & of course has control of the title deed 10 Co 94. Colitt 226. a. 4 Bac 110.

It is said that privies to deed must plead with perfect: this can only mean that they must make perfect, when the original parties, would have been required to do it: i. e. when their claim or defence is founded on the deed 4 Bac 111. 10 Co 92. (Just 267. 377) - Thus an heir is privy to the deed of his ancestor, sed vid title Evidence p. 67.

It is never necessary to make perfect of a record, even to the same court in which it is pleaded; and the rule holds a fortiori, if the records of other courts - for a record is not private property - but a public document, belonging to a public office. If it is in the same court where it is pleaded, the party pleads it, prays the court to inspect it - if in another court, it must be proved by a proper copy. - (Lawes 97. b. 110. 237. Bull N. P. 252. Park 20. 28. 1 Just 225. Fidd 529.) See as to private stamp - it.

But letters testamentary tho' a species of record, must be pleaded with perfect by the adm^r for they are in his possession and granted to him. Contra in Court.

If a deed is lost by time or casualty, it may be declared upon or otherwise plead

ed without prefat - So if in the possession of the adverse party - but the facts must be stated as they are, otherwise no reason appears for not making prefat (5 Co 74. b 75. a. 3 T.R. 151. 1 Wils 16. Sta 1196. 2 H. Bl 243. 63. 2 Roll 4 22. 1 ch 541. 1 Saund g. a. n. P. 20 29. 10 Co 72. 3.)

In such case relief was formerly had in equity, as it still may in some instances - In what? 1 Forb 14. 15. 406 109. 3 Atty. 311 61. 10 Co 292. 3 Br. Chy 218-3

But in such cases if the party shd inadvertently make prefat, he must fail - for the other party is entitled to dem and oyer, and as he can not have it, the cause is discontinued, so that Judgment must go agt him: but he may be relieved by amendment, striking out the prefat & inserting the special facts (1 Saund g. a. n. 1 Wils 16. 3 T.R. 153. n.) In these cases costs are always charged to the party amending.

In Com. though it is usual to make prefat, yet the Courts hold it to be useless - for oyer is demandable without it in all cases in wh. prefat is made in Eng^d (1 Roll 556.) there is nothing lost then by dispensing with prefat.

By the Eng^d Stats 16. 17 of Car 2^d and 4 & 5 Ann, the omission of prefat when necessary is mere matter of form till only on special demurrer. At Com Law it was matter of substance (1 Bac 113. 406 311. 1000 32. 2 Co El 217. 406 54.)

As to the mode of traversing deeds lost or destroyed vid "Evidence" & Prack v 29. 30.)

Prefat being made then, the adverse party may crave oyer of the instrument, i.e. demand as the words import to have it read, and may also require of a copy of it (3 Bl 247. 4 Bac 113. 1 Saund 96.) but he is not entitled to oyer of a deed pleaded without prefat - if the prefat was unnecessary and the party pleads does not make title under it, it is then mere surplusage. e.g. case of a bill of sale alleged as in duceunt to an action of fraud but pleaded with prefat. (1 Saund 97. 1 Atty 477. Fild 529. 406 217.)

But tho the prefat is unnecessary yet if title be made under it, oyer is probably demandable: as in case of a deed to the Husband pleaded with prefat in a writ of dower.

Granting oyer when it is not demandable is not error; adjudging the oyer erroneous would have no effect - the act being done cannot be undone. But refusing it when it ought to be granted is error; for the party craving it may have been prejudiced for the want of it: it is presumed necessary to enable him to plead (1 Saund 97. 9. 1 Saund 96. 1 Atty 478. 1 Chy 417. 2 Wils 375. Doug 478. 7.) and granting oyer when unnecessary cannot prejudice the party from whom it is demanded.

But to take advantage of error the party avowing oyer must enter his prayer on the record: this prayer is in the nature of a plea, and the other party may counterplead a demurr to it. - In this form Judgment must be rendered upon it, and that Judgment will be the subject of error (1 Samsd 98. Salk 498. Lawes 99. below 28. 2d Ray 969. 4)

Or he may file a bill of exceptions wh. will answer the same purpose. - (1 Bac 325. Ray 485. Bill of excep. 5.)

The object of obtaining oyer is to enable the party avowing it, to take advantage of any part of the deed wh. does not appear in the pleadgs. - Having obtained oyer, he may enter the deed verbatim on the record and thus take advantage of any condition or other fact not stated by the party pleadg it. - e.g. condition of a penal bond. - (4 Bac 113. 3 Bl 299. Lawes 98. 9. below 28.)

If there is any insufficiency, illegality, or other objection to the instrument, ^{wh.} apparent on the face of it, he may show it by averment: if it is apparent on the face of it as recited, the party reciting may demur. (Lawes 99. 2 Wil 342.)

But the party who on oyer recites the instrument, must at his peril recite it truly: if he makes any mistake in doing it, the party may sign Judgment as for the want of a plea: for the party claiming oyer and reciting it, implicitly undertakes to set out the instrument as it is. A false recital then, is a breach of his implied contract, and he may be considered as not having pleaded. - Or the party who pleaded the deed may procure it to be enrolled truly in his replication, by the proper officer of the Court, and demur to the plea of the party who falsely sets it out. The more convenient way however, is to sign Judgment as for want of a plea. (Lawes 100. 1. 1 Samsd 9. 6. 310. 17. 1 St 227. 4 T R 370. Com. D. Pl. p. 1. Carth 351.) -

Departure

Departure in pleading is said to be when a party quits or departs from the case or defence wh. he first made, and has recourse to another: as when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it. (2 Samsd 84. a. n. l. Co Litt 304. a. 2 Wil 98.) - for it is the proper office of every successful plea on ~~the~~ either side, to fortify what has been said before on the same side, by destroying what has been said agt it (1 Chy 618. 624.) thus the replication shd fortify the declaration, & the rejoinder the plea in bar (Lawes 163. 4 Bac 3. 1 Inst 303 b. 304 a. 2 St. Pl 280. 2d Ray 146. 9. 1 St 422. 5 Com. 99. 123. Bill 17. Ray 22. 3 Bl 310.) Thus if one pleads in bar a seffment in fee, and in his rejoinder varies his title a the

mode of acquiring it, as by pleading a gift in bail & a conveyance by lease and release the rejoinder is a departure. So if the matter first offered is pleaded at com. law, a subsequent plea supporting it as by particular custom is a departure. e.g. an action on an indenture of apprenticeship as at com. law, in common form, not reciting any custom - deft pleads infancy; plff replies the custom of London. - So in an action on contract, if to a plea of infancy plff replies a promise after full age and deft rejoins release: this is a departure (4 Bac 123. 1 Lev 81. 1 Hob a. Ket 276. 769. 572.)

A plea asserting a right at com. law, is not fortified by another shewing a statute right, on the contrary it is a departure. - thus in trespass for taking cattle the deft pleads that he distrained them damage feasant: plff replies that they were driven out of the county, wh. by stat makes him a trespasser ab initio, but at com. law is not actionable (stat of Marl. 32. Hen. 3. 12 Pl. 2. Henry 4 Bac 123. 3 Lev 48.)

But if one pleads a stat and the other alleges that it has been repealed - the former may reply that a subsequent stat has renewed it - for this fortifies the plea - it is a stat merely giving new life to the old one (4 Bac 123. 1 Lev 81.)

In County taken if deft pleads performance and plff replies that he has not performed such an act, a rejoinder that he has not performed such an act, but that he was ready to perform it, and that plff refused to accept performance is a departure: - for it admits the want of performance (4 Bac 123. 5 Com 99. 1 Inst 302. *See 442* *vid 10*)

So if a plea of infancy, rep: "usurious consid^r" rejoinder, release (1alk 222. 6 Mod 116.)

When the gravamen is alleged generally in the declaration & the deft pleads an evasive plea, a more particular statement of the cause of action is no departure (amb 103. 7. Lawes 163. 4. 5. 2 H. Bl 255. 3 Bl 311. Bull St. P. 17. Lawes 164. 5. 1 Samsd 28. n. 2 it 52. b. 3 Wils 20.) as in case of the com. bar in trespass (1 Wils 218. 1 Samsd 299. 6 b. 6.)

And matter wh. maintains and fortifies the plea, is no departure. e.g. trespass for a horse, plea damage feasant. plff may reply that deft has used the horse, wh. makes him a trespasser ab initio (1 Chy 622. Com. D. Pl. f 11. 1alk 221. 3 Wils 120.)

The plff may make a novel assignment. either with or without taking, either on the plea in bar. (Lawes 240. 1 T. R. 459. 636. Story 523. 4.)

It seems that departure vitiates the pleadings as quod demurres, tho there are some cases and authorities to the contrary (1alk 221. 2. 2 Samsd 144. 2 Wils 96.)

^{cont'd}
 Chy pl. 623. Ray 22. 94. Sta 222. Co Cas 165. n 233. Corb 184. Chy 623n. Com. d. pl. f. 10.
 1 Saund 117. Ray 2294.) the former opinion appears to be correct in principle, for
 a genl demurder does not confess facts wh. are ill pleaded (post)
 But departure is aided by accident, i.e. pleading considered merely as departure -
 this rule presupposes that what is pleaded is suff to maintain the claim or de-
 fence - thus in an action on cont, deft pleads infancy, plff replies a promise after
 full age; deft rejoins a release - this if properly pleaded wd be suff; and after ver-
 dict is good wth here - for it then appears from the whole record, that the right
 of recovery is barred, and therefore the deft must have judgment. (Ray 80. 4
 Bac 125. 1 Lev 110. 2 Saund 34. 1 St 117. Chy 623. Fidd 689.)

But it is not good on demurder, for the demurder does not confess the facts.
 they being ill pleaded, as in the instance above - the rejoinder if demurred to will
 1 Lev 110. Kelt 566.)

Demur-
 rer. -

Of Demurder. - Demurder is not defined in any of the books. -
 James says it is an irregular & collateral part of the pleadgs (James 42. 1 Chy 639.)
 It is a denial upon record of the legal sufficiency of the allegations demurred to. - It
 is derived from the french "demourer" to pause or abide, and signifies that act of the
 party by wh he refers to the Court the decision of some difficult point of Law. - (S. G.)
 It admits such matters of fact alleged by the adverse party, and such only as are
 well pleaded - but denies their sufficiency in Law to maintain the action or defence,
 and thus refers the question of their sufficiency to the Court. (4 Bac 128. 3 Bl 314. 1
 Inst 71. b. Lawes 167. 2. Com. Di. pl. 2. 5. Kelt 233. 1 Saund 333. n. 3.)

Demurrey then always advances a legal proposition viz. that the allega-
 tions on the other side are insuff in law to maintain the claim or defence, as a
 traverse alleges a denial a matter of fact. - It is in strictness not a plea, but an ex-
 cuse for not pleadg: this appears from the very form of the demurder itself - for the
 party avers that he is not bound by the Law of the land to make any answer to
 the allegations demurred to. (4 Bac 129. 30. 3 Will 292. 3 Bl Appx.)

Demurder may be taken to any part of the pleadgs, from the declaration to the
 surrebutter - hence it can neither be called a dilatory plea or a plea to the action. -
 (4 Bac 129. 1 Inst 72. a. 5. Mod 132.)

A demurder, beul. a special admits at Com. Law, no other facts than such as are
 well pleaded both as to matter and in point of form. - It however necessarily ad-

mits in general. facts ill alleged, for the purpose of arguments, and of deciding upon their sufficiency as pleaded. - (as dem. to facts well pleaded does in Ch.) tho' not for the purpose of concluding the party demurring as to the facts so pleaded in any future cases. (1 Wils 248.) hence the record could not be produced by way of estoppel. -

But since the Stat 27 Eliz 5 485 Ann. a genl demurser confesses all such informal allegations as are aided under it by these Stat. and they aid in sent all facts merely formal (Com. di. pl 2. 5. Lawes 167. 8. p. Hob 223. 58. 1 Sams 338. n. 1 Bac 945)

The aim of these Stat is that when the defects in pleadg on either side, are in point of form only, advantage must be taken by special demurser. The Stat 27 Eliz mentions formal defectively - the 485 Ann enumerates a variety of defects which the declare formal merely. - (4 Bac 133. t. 6.) Thus in Cook vs Kear plff assigns some breaches ill & deft demurs genly a specially (as the case may be) to the whole: plff will have judgment only on those wh. are well assigned - demurser confesses those only and not the others (4 Bac 131. 1 Wils 248. Salk 218. 2 Sams 297. 8. Hob 326. 86. 1 S. d 10. Co. Lac 357.)

A demurser never confesses an avermt wh. contradicts what is before certain on the record; as if one part having confessed an allegation on the other side, afterwards alleges what is inconsistent with it, or pleads a record to wh. he was a party, & then makes an avermt inconsistent with it: (3 Lev 124. Co. Lac 35. Lawes 168.) here the matter alleged is not well pleaded, for the avermt is inadmissible in the one case as being agt a prior confession, and in the other on the ground of Whoffel. In both cases it is opposed to what is before made certain. - So of avermts wh. are inadmissible - the laws of pleadg do not supersede those of 1 S. d 10. Com. di. pl. 6. Lawes 168.)

So of avermt wh. appears on the face of the record to be impossible, as being incredible, being legally proved: the avermt of such fact is a good cause of demurser (1 S. d 10. Lawes 168.)

Also allegations wh. are impertinent & wh. are neither material or traversable: for what one cannot deny, he does not admit by not denying it: if he did he might sometimes make the truth of slanderous words matter of record. (Lawes 168. Salk 561. 4 Bac 131. 5 Com. di 139.)

But if a fact is well pleaded, a demurser will confess it, tho' it could not have been distinctly traversed: as consideration in Assumpsit &c.

So of facts in themselves immaterial, but made material and traversable by being precisely pleaded (ante) So also a conclusion of Law made by the adverse party from facts stated are not admitted by demurser: for

94. a demurree admits facts only, not principles: - thus "front a bene licent" in a plea of justification is not confessed by demurree; nor does it confess a promise in indeb. ass't. if the facts stated are not suff't to raise a promise in law: as if indeb. ass't. sh'd be brought without averring a consideration (Holt 56. 4 Bac 131.)

After an issue in fact is joined, it closes the pleadings - but this does not mean that one party by conceding to the country can preclude the other from demurring - it holds only after the verdict is added (Shorr 213.)

Demurree is usually called an issue in law: but this is perhaps not strictly correct; in tendered an issue in law as a special traverse does an issue in fact: - but the issue is not closed until the other party joins in the demurree (3 Bl 313. 115. 1 Inst 71. 2. 126. a. 4 Bac 54. 129. Lawes 43.)

If there is a demurree and an issue in fact in the same case (as there may be in diff't parts of the declaration, plea &c) the demurree is to be first regularly determined - for in this way the Jury may assess all the damages at once - which they do not do if the issue in fact were first tried & both issues found for plff. Still it is in the discretion of the Court to try either first (4 Bac 130. 5 Com. 136. 1 Inst 72. 125. b.)

Palmer
577.

If in this last case Judgment is for plff on demurree, he may if he pleases enter a "Vol. pro" as to the issue in fact, and have his damages assessed on the fact demurred to only: as if several breaches are assigned in count broken, some of them demurred to, and others traversed (4 Bac 130. 5 Com. 136. Salk 219. Sti 574.)

There cannot be a demurree to a demurree - it works a discontinuance (4 Bac 131. Id Ray 20. Salk 219. Comb 306. Lawes 172. 1 Chy 646. 5.)

According to Lord Holt there is one exception to this rule, when a demurree to a plea in abatement is not (Comber. 306) the principle of this exception is not apparent: every question that can be raised after the second demurree will come up under the first - the exception is denied (Salk 219. Lawes 172. 2 St R 453.) - In all other cases at any rate, the party to whom a demurree is tendered, must join. A demurree cannot in the nature of things be immaterial: it goes through the whole record (Com 316. 3 Bl. after fallow).

Demurrees are of two kinds - General and Special (4 Bac 132. 1 Inst 72. Lawes 117.)

A demurree not assigning specially any particular cause of demurree is General: One pointing out specially the particular defect on which it is founded, is Special. - 4 Bac. 132. 1 Inst 72.)

Lanes says that special demurrers were introduced by Stat 27. Eliz C. 5 (Lanes 167.) but this is totally incorrect, for according to the ancient practice they were always special (4 Bac 132. 1 Vent 240.) and Lord Coke says it is a good rule to make them special in all cases (2 Inst 267.) (It is doubtless the better way, where there can be a doubt whether the pleads demurred to are faulty in substance or not).

They are rather made necessary by that Stat in certain cases where General demur-
rer was proper at Com. Law (1 Sams 337. b. Hist 232. 1 Vent 240. 4 Bac 132.)

To constitute a special demurmer, the cause of demurmer must not only be assign-
ed, but assigned doct forth specially: assign a cause generally does not make
the demurmer special: thus setting forth that the declaration is double and wants
form is a genl and not a special demurmer (4 Bac 132. 1 Mils 219. 1 Show 242. Comb 297. ^{Ld Rayd} 177.)

A special demurmer reaches all the defects wh. a genl demurmer does, &
others wh. a genl demurmer does not: for as to defects not pointed out as causes of
demurmer, it is the same as a genl demurmer: - it extends to all formal defects prop-
erly assigned as causes of demurmer. -

All substantial defects (i.e. the omission of such things as are material to the
right of action or defence) are reached as well by General as Special demurmer.

But by Stat 27. Eliz c. 5 Ann, defects in form (except in dilatory pleas) are
reached by special demurmer only; tho it was different at Com. Law. -

The Stat 4 & 5 Ann c. 16, aid all defects in Genl demurmer, if sufft matter appear
in the pleads upon wh. the Court can give Judgment, according to the very rights of
the cause (10 Co 83. Salk 135. 1 Inst 72. a. St 124. 4 Bac 94 5732. 3. Ash 127. 164. 5 Seld
18. Salk 291. 3 Bl 315. Lanes 167. 8. 9. Com. di. pl. 9. 5. 6.

At this time, a demurmer to a plea in abatement never need be special; these stats
do not require it: they extend only to demurmer to the declaration, or to some plea
to the action. Such pleas (i.e. in abatement) are never favoured in Law (Ld Ray 337.
1015. Salk 194. Fidd 138. 3 X. R. 186. 1 Chy 456. vide as to form 2 Chy 679. 682.)

It is here to be observed that in all pleadgs two things are necessary. 1st that the matter pleaded be sufft in Law. 2^d that it be alleged according to the forms of Law c 1 Inst 303. 4 Bac 2. Hob 164. (ante) the want of either of these requisites is a good cause of demurrer. If the pleadg is different in matter or substance a good demurrer is proper. If the defect be in form only the demurrer must be special under the facts maintained above c 40tt 232. y Mod 71. 4 Bac 2. 130. 2d Ray 882. 793.

The omission of that without wh. the right does not sufft appear, is a defect in substance: but the omission of that without wh. the right does appear, tho' not alleged according to the forms of Law, is a defect in form only (Hob 232. 3.)

Matter of substance is that without ^{it} there can be no cause of action: thus if in an action on Cont. pff does not aver performance of a condition precedent, it is a defect in substance: for there is no cause of action without it. So if in an action of slander the averment of malice is omitted, consideration in Ass't, conversion in Trove &c. -

But duplicity or a want of venue in Transitory actions is a mere error in form. (4 Bac 2. 119. 134.)

When there is a total want of substance, or a material allegation is omitted, a Genl as well as a special demurrer will reach the defect: as if one sue another in Slander, for calling him a Jew or a Heretic: or if pff in Trove shd not state property, or in Tresp shd not state possession (Hob 133. 198. 232. 301. 1 Inst 72. a. 1 Sid 184. Carth 339. 1 Com 128. Sta 624. 3 Bl 374.)

If a party plead any thing of wh. he appears on the face of the record to be estopped from pleading; it is ill on Genl demurrer: i.e. if the allegations demurred to are material - for the objection is not to the form of the averment, but the averment of the fact in any form (Lanes 38. 170. 140. 146. 158. 161. Will 13.)

Or the other party may reply the matter of Estoppel specially (Lanes 76.) but why reply what already appears on the record? q. de hoc

A special dem. reaches no other formal defects, than such as are specially assigned for cause of demurrer as to all other defects not thus assigned it is but a general demurrer (4 Bac 132. 10 & 88.)

A demurra reaches back thro' the whole record, and attaches upon the first substantial defect in the pleadgs: hence tho' the parties join in demurra upon a single point or particular part of the pleadgs, the court give judgment upon the whole record, and the party upon whose side is the first substantial defect, must fail:— thus suppose the declaration to be bad, the plea in bar & replication both good, & the rep.ⁿ demurred to. Now the point before the court is, whether the rep.ⁿ be good or not: but altho' it be good, judgment must go agt p^lff, for it can avail him nothing unless it fortifies a good declaration: Or if decl.ⁿ be good and the plea & replication bad; the rep.ⁿ being demurred to, judgment must go agt p^lff. for the first defect is on his side (1 Chy 647. Hob 56. 199. 200. 14. 5 Co 52 b. 9. 110. 111. d. Ray 1080. Salk 455. 640. 2 Vent 49. Com. D. pl) vide arrest of judgment.

But there is an exception to this rule, in case of debt on bond for performance of covenants, or an award &c. If p^lff pleads an insufft plea & p^lff in his replication assigns no sufft breach, debt shall on demurra to rep.ⁿ have judgment, tho' the decl.ⁿ is good and the plea ill:— for tho' the plea is in the order of p^learly before the replication yet the replicatⁿ is in such case a kind of supplement to the declaration, & the cause of action does not appear, till it is disclosed in the replication. This is virtually the same thing as if p^lff had made his declaratⁿ special, and assigned the same breach in that wh. he now assigns in his replication (3 Co 53. 8. 110. Plm 297. 2 Bulst 94. Co. Lac 133. 221. d. Ray 1080. —)

If there are several pleas in bar (under the stat allowing them) going to the whole declaration & demurred to, if one of them is good, debt will have judgment, tho' all the rest shd be ill: for there is one sufft defence: and it appears from the whole record that debt ought to be barred (1 Saund 80. 2 Barn 449.)

The for me of demurra in court, that the declaration &c and the matter herein contained, are insufft in law & therefore he prays judgment. Soinder "that his decl.ⁿ &c are sufft in law & therefore he prays judgment. (vide 3 Bl appx xiii for form in Eng^d. 4 Bac 130. 1 Inst 41. b. Lawes 243. 4.)

It is not necessary, tho' usual in Eng^d to conclude a demurra with a verification: for that wd be a mere avowry that p^lff wd make it appear in arguing; there can be no use in thus keeping the pleadgs open—there can be no pleadg after a demurra (Lawes 172. 1 Leon 29. 5 Mod 132.)

In civil actions, judgments upon demurra follow from the nature of the

pleading demurred to: thus if a plea in abatement is judged insufficient upon demurrer the judgment is a "respondeat aster". If a plea to the action is demurred to, judgment goes in chief (4 Bac 132. Clerk 306. Dyer 69. 341.)

In criminal cases short of felony, if a demurrer to an indictment for a misdemeanor is overruled, final judgment goes agt the prisoner (4 Bac 132. Cro. El 196. 2 Hawk 334. 11 Co 60. 1 Roll 89. 2 Kibb 139. Hale 357. 243.)

But in prosecutions for felony, or any capital offence, the better opinion is that the criminal may plead over after his demurrer is overruled, "*in favorem vite*" (4 Bl 334. 8. 2 Hawk 334. Cro. El 196. 2 Hale 239.) contra 2 Hale 257. 243. 315.)

Demurrer to Evidence. In certain cases, & indeed generally when the pleadings terminate in an issue in fact, one party may take the examination of the cause from the Jury to the Court by demurring to the evidence which the adverse party exhibits in support of the issue (4 Bac 136. 1 Inst 73. Allegre 8. Ray 402. Bull N. P. 213.) This is called a demurrer to the evidence, & is essentially a demurrer to facts shewn in evidence, & in this respect is distinguished from a common demurrer which is regularly taken to the facts alleged in the pleadings. - After when taken to averments made agt matter of Estoppel. -

It seems that a demurrer to evidence must be taken before the party demurring exhibits any evidence on his side - tho' probably he might still demur were he to waive such evidence (1 Post 576.)

It must be taken to the whole of the evidence exhibited in support of the issue, & can be taken to the verdict of that party only who takes the "onus probandi".

The relevancy of evidence is matter of law to be decided by the court - the relevancy being established, the question how far it conduces to prove the issue a fact to be ascertained is a matter of fact to be determined by the Jury (2 H. Bl. 205. Doug 360.)

It follows then, that it can never be proper to demur to evidence which is clearly relevant to the whole issue, however weak it may be; and evid. is always relevant to any issue which it conduces in any degree to prove (2 H. Bl. 205.) But where the facts are uncontested, and the party wishes to remove the cause to a higher Jurisdiction, to obtain their opinion, it may be proper to allow a demurrer to evid. which lays a foundation

for a writ of error - the party is thereby enabled to produce the record in error. -

A demurrer puts an end to the issue of facts, and refers to the Court the application of the law to the facts shown in evidence. - In the nature of the thing therefore, it admits the facts shown in evidence by the adverse party, & like other demurrers denies the legal operation in his favor: i.e. their sufficiency in law to support the issue (4 Bac 136. 2 Lev 146. 1 Inst y2. 2 H. Bl 205. 6.)

Matter of fact then, wh. the party offers to prove, for the purpose of proving his issue, must be ascertained before the question of law can arise on demurrer - hence the necessity of the admission (hereafter mentioned) which the party demurring to evidence is, in some cases required to make upon the record (2 H. Bl 205. 6.)

When the whole evid. in support of the issue is written, there never was any doubt that it might be demurred to, & then the party exhibiting it must join in the demurrer & waive the evidence: for the leading objection to this kind of demurrer is, that the evid. is not sufficiently certain: but by the writing it is made certain, so that there cannot be any variance: as when a deed is exhibited in evidence of a title (4 Bac 136. 5 Co 104. Co il y57 2. 1 Inst y2 a. 3 Bl 372. 1 Ro 571. Bull N.P. 313.)

The question how far a party exhibiting part evid. wh. is demurred to, is bound to join in the demurrer is not fully settled by the old authorities (4 Bac 136. 1 Lev 87. 1 Inst y2. a. 5 Co 104.)

According to Co. il y57. 2. he is not bound to join because the evid. is uncertain.

But this subject is now systematized and may be explained by the 5 following

Rules. 1. Where the evidence is all part, the parties may agree to join in demurrer. 2. If one of the parties produces any witness to prove any definite fact, the other by admitting the fact on the record, may oblige him to join in demurrer to the evid. produced to prove it, or to waive the evidence (2 H. Bl 206.) As if negligence in keeping goods is offered as evid. of conversion in Trover - the deft by admitting the negligence (wh. will not prove conversion) may demur to the evid.

3^d If the part evid. exhibited in support of the issue is certain (i.e. distinct & explicit as contradistinguished from indeterminate & circumstantial) the adverse party, by confessing it on the record to be true, may compel the party to join in demurrer, or waive it (2 H. Bl 206.)

4th If the parol evidence produced is loose and indeterminate, the adverse party cannot demur to it, without admitting it as certain and determinate as well as true. But by making such admission upon the record he may demur to it whether it is written or parol (5 Co 104. 2 H. Bl 207.) And the party producing it must join or waive the evidence. But he is not bound to join without such admission (Pill N. P 313.) - for without it the fact testified about is not ascertained even admitting the evd to be true, but the question of fact would itself be referred to the court: Thus if a witness states a fact according to his belief, or his best recollection &c the party demurring shd state the evd in the words of the witness, but as being certain and determinate, i.e. positive and unquestioned as well as true; otherwise the weight of evd wd be referred to the court. For merely admitting the evidence to be true, is admitting only that the witness believed the facts to be true, & thus the fact which the evidence conduces to prove is left unascertained. -

5th If the evd. produced is circumstantial,* the party demurring to it must distinctly admit upon the record every fact & every conclusion in favour of the opposite party wh it conduces to prove, i.e. every thing wh a jury might infer from it. He may then demur to it, even tho it is parol. Secus not (Doug. 114. 127. q. 2 H. Bl 207. q. Alleyne 3. Pill 313. Sti 22. 37.)

* Circumstantial evidence is evd of some collateral fact, from wh the principal fact may be inferred or presumed - the truth of it is always consistent with the mere existence of the principal fact.

A strict observance of the above rules must prevent any undue advantage being taken.

Evidence conduces to prove any points to wh it is relevant, e.g. If circumstances are given in evd. agt the accepta of a bill of exchange to raise a presumption that he knew the payee to be fictitious, he must admit in his demur to the evd. that he knew the fact and not merely that the evd was true: otherwise the weight of the evd would go to the court, for the matter of fact is not ascertained. -

If the party demurring does not in these cases make the admission required by the rule, the other party is not compelled to join in the demur. If he should join, the court would give no judgment, for the reason ut supra - In such cases therefore a "venie de novo" must be awarded (Pill 313. 4 Dec 1377.)
 { 2 H. Bl 209. }

The point in issue on demurrer to *vid.* is, whether the *vid.* demurred to is *aff.* in law to maintain the issue in fact? It is so if it conduces to prove the whole issue - if it goes to a part only, the demurrer will not be good. -

On such demurrer no advantage can be taken of any defect in the *pleadings* - but after the demurrer is decided, advantage may be taken by motion in arrest of judgment as after verdict (Doug 268. 12. Bull 313.)

And the question stands probably as a similar one would after a general verdict - the issue being considered as proved, & the fact demurred to as evidence not

See under the motion in arrest of judgment.

The right of demurring to *vid.* is not "*stricti juris*"; for the party whose evidence is demurred to, may always demand the judgment of the court whether he ought to join: for if there is no colourable cause for demurring, the court will not allow it: lest justice should be delayed on frivolous pretences. - (4 Bac 136. Bull 314. 2 Roll R 117. 2 H. Bl 205. 18. Lilly 407. 2d Ray 437.)

On demurrer to *vid.* & *joinder*, it is usual for the court to dismiss the jury immediately: if it is determined in favour of *Plff.* a jury may afterwards assess the damages - but the court may direct the *jury* to assess the damages provisionally, & if the demurrer is decided for the *Plff.*, they will give judgment for the damages so assessed (Bull 314. 2d Ray 68. Plowd 410. Tack 284. Doug 212. 2 H. Bl 200.)

In court there is no writ of inquiry; *dam.* are assessed on dem. to *rv.* by *Ch.* ^{2 Ser 258} _{1205 570}

If any particular part of the *vid.* offered in support of the issue being objected to, is admitted by the court, the party objecting cannot demur for that cause - for a demurrer must go to the whole evidence given in support of the issue, & the court cannot say that part of it is insufficient. The proper remedy is to Bill of Exceptions - the court cannot refuse to decide a question of Law (4 Bac 136. 12. 326. 9 Co 136. 1 Inst 331. 2d Ray 341. 9.)

The whole proceedings in demurrer to evidence (as the entering it on the record admitting it to be true) is under the direction of the court, & when no colourable cause appears they will overrule it (2 H. Bl 208. 9. 2 Roll R 117.)

It may be asked, why a demurrer to *vid.* is more under the direction of the court than any other? because the parties might otherwise pervert the course of justice, by uniting in referring to the court what they had no right to decide. - ^{For} *Form vid.* ^{Hen} 2 Bl 200; Bull 314.

The legal proposition advanced is "that the verdict advanced is not sufficient in law to maintain the issue," and the plea concludes by praying that for want of sufficient matter in this behalf, the jury may be discharged from giving any verdict, & that the Plff may recover or be bound according as the plea is on the part of the Plff or deft (2 H. Bl. 200. 2 Swift 256.)

Arrest of Judgment. To arrest judgment is to prevent, stay or stop it (French arreter): this is done on motion reduced to writing & entered on the record.

This proceeding is usually had only after an issue at fact tried and verdict found (3 Bl. 386. 393.) But it may be after a default, or a demurrer to evidence determined contra. 2 Burr 900. Doug 208. 13. 2 Stea 1271.)

The principle on which judgment is arrested is, that as the judgment of the court is a conclusion of law from the facts ascertained on the record, ~~and as it must~~ be given on the whole record; and he who does not appear upon the whole record to be entitled to judgment, cannot have it, even tho' a verdict has been found, or a default suffered on a demurrer to the evidence decided in his favour.

At com. law, the issue raised by the motion, viz. an issue in law, - judgment being arrested for intrinsic causes only, i.e. such as appear on the face of the record - as when the declaration varies totally from the writ, one being in debt, the other in case (3 Bl. 393.) Com. practice varies in point of form only.

The rule is the same where the verdict varies materially from the issue: for in such cases, the issue not being found either way, it is impossible to render judgment upon it - all the facts in question are not ascertained. e.g. slander for the words "he is a bankrupt" (3 Bl. 393.)

So if the declaration is wholly insufficient for any cause, judgment will be arrested: there is no foundation for judgment in this case, and therefore the Plff cannot have it, *et cetera*. On the other hand if Def's plea on which he has obtained verdict discloses no legal defence to the action, the declaration being good, judgment may be arrested by Plff: as if deft in debt should plead "Not Guilty" (ib.)

Under this head the material point is to ascertain what defects in the pleadings will support a motion in arrest of judgment after verdict, and it is a Good Rule

Judgment may be arrested after verdict for any cause which might be assigned after verdict & judgment for error - In other words if judgment in pursuance of the verdict would be erroneous, it may be arrested (Com 174. Jack 77. 2 Bl. 716.)

It seems necessary then to determine what defect will & what will not make a judgment after verdict erroneous. The Genl rule is that if the Statement of P^{lff} title a cause of action & that only is defective, it is aided by verdict, and a motion in arrest of judgment cannot prevail. And so of Def^ts defence, "mutatis mutandis". Thus if in Tresp. the declⁿ does not lay a day certain, this is ill at Com. Law on Genl demurres: but if a good Tresp. is laid, & if P^{lff} obtains a verdict, he will recover judgment (3 Bl 394. Doug 658. 1771. Plowd 282. Sack 365. 5 Bac 317. Sta 1023. Co. El 377. Carth 389. Co Jac 311. Sta 232. Bull 320.1. Com. Dig. ple. 87.)

This particular defence is now matter of form by Statute. (1 Saund 118. 286. Gill C. pl. 132)

But if no cause of action or a defective one is stated it is not aided by verdict, & motion in arrest will prevail (possibly) as in case of a grant of an incorporeal right, alleged to be by parcel - So slander for calling P^{lff} a Jew, or omitting the amount of malice in slander, or justice, against the widow, or conversion in Trover. (3 Bl 394. Doug 658. 1771. 1844. L

The same distinction applies "mutatis mutandis" to the defence pleaded by the def^t; as in the case above mentioned "Not Guilty" pleaded to debt: for here nothing wh. the P^{lff} has alleged is denied (3 Bl 395. Co. El 778. 1771. 1806. 4th 475 yb 618. Co. En 497. Sack 120. 365. Bull 320. 3 Burr 1727. Carth 389. 1 Mod 292.)

It is an invariable rule that any defect in the pleadings wh will support a motion in arrest of judgment must be such as would have been fatal on General Demurres (3 Bl 393. 4. post) But the rule does not hold conversio, that whatever would support a Genl demurres will support a motion in arrest of judgment. for if the declaration or other pleadings omit some particular circumstances without proving which the party obtaining the verdict ought not to recover, but wh. is implied from those facts wh are alleged and found, the omission is aided by verdict, tho it would have been fatal on Genl demurres. - Thus if the value is not stated in Tresp. the jury in assessing the damages are supposed to have found the value: or if time is not stated the Court will presume that the jury in making up a verdict, fixed on the day before the suit was commenced: for they would not have admitted proof as to any subsequent day. The verdict thus supplies the fact omitted in the pleadings (Exp. & 407. 3 Bl 394. 5 Bac 317. 10. 176. Carth 389. Co Jac 44. 2 Wils 176. 10 Mod 351. Kelt 54. -) So of a grant of an incorporeal hereditament, or a release pleaded without alleging it by deed. -

The ground on wh. the pleadings are aided according to the above distinction,

is, that after verdict, the court must presume that all facts not alleged, wh. are necessarily implied from those wh. are alleged and found, are proved to the jury on trial. In other words the court must presume in support of the verdict every thing wh. in point of fact it was necessary to prove to warrant the finding. - (Doug 658. 17. R. 145. 1 Samd 228. n. 1 Bull 320. 10 Tra 1023. 1 Wil. 172. Coupl 827.)

It must also presume every thing wh. it was necessary to prove for the purpose of proving the issue (1 Bull 320. Doug 658. 2 Robt 283. 41 Dac 86. Ray 487. 3 Bl 374. Cuth 180. 389. Sta 212. Sal R 120. 602. 5 Mod 287. 5 Bac 317. 7 T. R. 53. 1 Mod 292. 169. 17. R. 545. Plow 118. 2d Ray 810. As Car 497. 2 Samd 376. Coupl 827. - Thus the verdict aids the declaration tho' it w'd have been ill in Gen'l term. -

A demurrer is to a certain allegation, & for certain purposes admits them - but if the facts are not well pleaded, a demurrer does not confess them but for the sake of argument. A common example given is that of a feoffment pleaded without averment of livery of seisin and found - The court will presume it is said that livery was found on the trial, for it is a necessary part of the feoffment (1 T. R. 145. 5 Bac 317. 10 Mod 310. Keble 574.) But this is not a proper example for the pleading was good in the first instance even upon special demurrer (1 Inst 303. b. Co. R. 401. Lawes 48. Com. Di R 69. Co Ecce 211. 41 Bac 100. Plow 49. 8 Co 82. b. see vide Thorr 233. Ray 487. Sal R 120. 4 T. R. 472.) and the verdict is said to ascertain those facts wh. from the inaccuracy of the pleadgs did not appear (3 Bl 374. 2 Mod 292.)

On the other hand nothing can be presumed to be found, except those facts wh. are alleged & found & such as are necessarily implied in a follow^{from} them; hence if the Title & cause of action appears defective (instante) the defect cannot be aided. - (Doug 658. 3 Burr 1728. 3 Bl 374. 17. R. 145) e.g. action for calling Plff a Jew; here there is no fact to be presumed wh. could make the words actionable - Want of substance is said to be total where there is no part of a cause of action. -

But if any one fact is omitted without wh. the cause of action is not complete, & wh. is not inferable from those facts wh. are stated & found the fault is not cured: - for the facts wh. are omitted cannot be presumed to have been proved: - to the jury, of course the verdict cannot by any intendment supply it (3 Bl 375. 1 T. R. 75. Sal R 305. Thus if an ass't or cont broken, performance of a condition precedent is not averred the declaration is not aided - for the fact does not follow from those wh. are

alleged, & is not necessary to be proved to the Jury to warrant them in finding those who are alleged: for the proof of those who are alleged does not invalidate the proof of this (4 Macell. 7 Co 10. a. 5 Com 45. 17. R. 645. 8 it 127. 8. 7 it 125. 4 it 472. 3 H. 18 574.) So in all cases of mischief done by a dog &c if scienter in the deed is not alleged. - (Doug 658. 2 Atk 662. 3 it 12.) So in an action agt indorse of a bill, if Plff omits to state notice to deft of acceptors refusal (Doug 654.)

The Court cannot on principle presume any distinct fact which is omitted because in point of Law merely it is necessary to warrant a recovery - for such presumption cannot be raised but upon the supposition that the Jury are competent judges of the Law. But this supposition would go to cure every defect in the verdict. And indeed it would be presumptuous even to make a question after verdict as to the sufficiency of the pleadings - It must be necessary to warrant the Jury on finding the fact: thus omitting to lay a consideration in Assumpsit is not cured by verdict: for the fact that a promise was made does not imply a consideration: - and the consideration is necessary in Law to the validity of a promise, it is still not implied in the fact that a promise was made.

The old Superior Court of Common made a great mistake when they decided that such an omission was cured for reasons above given (Kilby 403. 1 Vent 27. 78. R. 337.)

Mistake in arrest of Judgment after a default, operates exactly like a general demurrer - Nothing is cured by verdict, for nothing can be presumed to have been proved, there being no finding at all (2 Burr 900. 2 Tria 1270. 1 Milt 171.)

The rule is undoubtedly the same after special verdict - nothing can be presumed, for all the facts are specially found and appear upon the record (2 Milt 333 347.)

In some cases however, Judgment will not be arrested for the greatest defect, & even this nothing be decided by the verdict: this happens, where the first radical fault in the pleadings is on the side of the party who moves an arrest. For Judgment must be given upon the whole record: thus if the ^{verdict} Judgment is in favor of the party who, upon the whole record appears entitled to Judgment, he shall have Judgment, however faulty on his part may be the particular pleadings on which the issue is taken. e.g. if the whole declaration is insufficient, the plea in bar frivolous & issue upon it found for the Deft, the Plff cannot arrest the Judgment - for the first radical defect is on his side, & a frivolous plea is good enough for a bad declaration (4 Bac 131. 3. 2d Ray 1180. 1. 3 Co 120. 133.)

So if the declaration is good; the plea in bar & the replication both frivolous - issue taken on the replication & found for plff - he shall have judgment for rep.ⁿ is sufft for plea (Holt 56. 3 Lev 244. 9 Co 110.)

When judgment in pursuance of the verdict is arrested, judgment in chief agt the party for whom the verdict is found may sometimes be rendered: this is called a "judgment verdicto non obstante". - Rule.

If the party agt whom issue is found appears upon the whole record entitled to judgment, it must be rendered in his favor cit auct. 1 Burr 257. 5. 6. 6 Bro. P. C. 377. 1 Chy 634.) Thus suppose the declⁿ is insufficient joined & found for plff: now a judgment in pursuance of the verdict will be arrested & one entered for the deft - for the declⁿ is of no effect (Holt 56. 197. 1 Chy. pl. 634. Holt 200. 8 Co. 120. 133. 1 Burr 257. 6.)

But judgment is never first arrested, except in very clear cases. If the cause be not such, a repleader may be awarded. So if the declⁿ be good, plea in bar frivolous, & issue taken upon the plea a replication & found for deft - plff must have judgment. cit auct. 6 Bro. P. C. 377 1 Bl 257. 5 or 1. Bro. P. C. 257. 5.)

Repleader. is awarded on motion in arrest of judgment.

If issue is taken on an immaterial point so that the finding does not in law decide the right, judgment may be arrested & a repleader awarded. (2 Saund 319. a. n 6. Carth 371. 2 Mod 137. Cro. Jac. 434. 585. 1 Saund 23. n. 1. 6 Sa 12 539. Id. Ray 922. 6 Mod 1. 1 Chy pl. 632. 4. Com. D. 14. R. 18. 13 ac pleas. m.)

When the traverse leaving what is material, puts in issue a point wh. is not so - or a point traversable as matter of law - a repleader may be awarded - as if in an action of asslt agt an eye as such, he pleads that he did not assault & promise (2 Vent 196. 3 Bl 195) for in such cases the issue on wh a verdict is found, being immaterial, the court cannot regularly discover from the record, for whom judgment ought to be rendered - nor can the court ever discover this, from an immaterial issue found for the party traversing, except as the case may be, where it is immaterial only as being a negative pregnant (142. Cro Jac 434. 2 Saund 319. b. 1 it 228. n. 1.)

So in an action agt Husb^o wife for a wrong done her while sole:

denk 102. 10 Co 10. 5 Bac 286. Dyer 362. Saek 173. Lo Ray 924.)

Upon repleader awarded, the pleadings begin de novo, & regularly at that stage at wh. the first deviation from the rules of pleadings occurred, or at the first fault wh. occasioned the immateriality. 2. 9. Plea in bar good: plff traverses an immaterial part of it & has verdict; or a repleader awarded, Plff is to make some other answer to the plea in bar (3 Bl 395. Saek 173. 211. 579. 1 Burr 381. 6. 2 Saund 219. b. Ray 453. Id Ray 169. 3664. 1 Mod 2. Corp 570. 4 Bac 124.)

- + According to these two last authorities if the declaration & plea are the parties begin "de novo". But how can this be, except by a new suit, or by an amendment allowed on motion: neither of wh. can be properly
+ called beginning de novo. That the judgment of a repleader is awarded for a fault in the issue, such party may avail himself of the generality of the judgment to correct his own pleadings, even back to the declaration: so it seems: but if the declⁿ is radically ill, there cannot be repleader - the Deft ought to have judgment (ante). The rule however regards defects in stating the title a defence, not such as shew to the court that none of stating, it could avail (Chy 834. Com. D. pl. 2. 13.)

Repleader for the immateriality of the issue is never awarded, it seems, in favor of the party who tendered the issue - judgment goes agt him if verdict is agt him: for it then appears from the face of the whole record, that the other party is entitled to judgment. (Doug 380. 1. 1 Saund 303. 1 H. Bl 644. Corp 581. 2 Saund 219. Lidd 824.)

The same thing happens when the verdict is agt the opposite party - But as he has joined in the issue he cannot have judgment entered agt the verdict - only a repleader. as if in an action for a battery, a justification with a "manus molliter imposuit" is pleaded & precisely traversed. Now if verdict is for Deft he will have judgment: but if found for Plff. it is open to the implication that the Deft did not lay his hands on him at all - a repleader is then awarded - So in an action of debt on bond payable on a before such a day; payment before the day is pleaded & precisely traversed - if found for Deft it shews that he is entitled to judgment, & he will have it: but if found for plff, there must be a repleader. Hence an issue may be immaterial if found one way & material if found another; as in the last

example (2 Burr 944. 4 Bac 66. 2 Wils. 173. 148. Com. Rep. 148.)

Repleader is never awarded after demurrer or writ of error - but only after an issue in fact (5 Co. 52. Popk 42. &c.) For a dem. it is alleged insufficient - & on writ of error that judgment is reversed & sent back to the court below - they have only to assess damages: for the parties have already put themselves upon the judgment of the court, & an issue in law looking thro' the whole records, cannot be immaterial or indecisive (1 Chy pl. 634. 4 Bac 129. 5 Co. 52. Popk 42. Latoh 146. 6 Mod 102. 2 Saimd 319. (Slew 120. 440. since denied))

But in Corn a repleader has been allowed after a writ of error. Bacon & Curtis Sup. Court Litchfield County. -

If repleader is awarded when it ought to be denied, or denied when it ought to be awarded it is error: for it will then appear on the face of the records that the law has not been done (1 Chy 633. 4 Bac 126. Sack 579. 6 Mod 3. 1 Day 27. 152. Sack 579.)

There can be no repleader after a default or discontinuance. In the case of a default plff does not wish to plead - & Deft has either not pleaded or abandoned the plea - In the case of a discontinuance the party discontinuing is out of the Court, & in neither case is there any issue on wh the judgment of the Court is required (1 Chy 633. 4 Bac 127. Sack 579. 6 Mod 3. Comb 323.)

At Corn. Law repleaders are sometimes awarded before trial - for verdict aided is no issue at Corn. Law. - But since the stat of ¹⁷⁹¹ ~~1790~~ the rule is changed: if the issue may be cured by verdict or by these statutes, the court will not interfere before verdict to see whether the fault is incurable or not - but they may still in their discretion award a repleader when the defect is clearly incurable, and the issue will not decide the cause which may so ever it be found (Chit 133. 4 Bac 56. 126. 7. 1st 90. 103. 3 Keb 61. 4. 6 Mod 2. 1 Slew 32. Carth 37. 4 Leon 19. Skin 570. Sack 579.)

For form of repleader vide Luttw 1622.

Arrest of Judgment & Venire de Novo. Judgment is sometimes arrested for defects in the verdict - as if the jury found only part of the issue omitting some thing material either way. In such cases a venire de novo issues (5 Bac 296. Cro. El 103. 3 Leon 82. Hard 66. 1st Ray 1521. Sta 346. 1089. 1 Inst 227. Esp 421.

So if in a special verdict the jury find only the evidence of a material fact & not the fact itself either way, there must be a "venie de novo": as if demand and refusal in trover without any fact amounting to a conversion (East 111. Burr 1243. Esp 590. 10 Co 56. 7.) But if the substance of the issue is found it is suff: judgment will not be arrested for mere want of form; but the writ will from necessity aid the formal part (1 Inst 327. 1 Vent 27. 12 Mod 5.)

If the verd. vary in substance from the issue it is ill & judgment is regularly arrested: as if the jury find something foreign from the issue instead of the issue itself - here too a "venie de novo" is awarded (5 Bac 299. 2 Roll 709. 1849. 749.

2 Vent
187.

But a verdict wh. finds the issue is not vitiated by finding something more - this is mere surplusage - "utile per inutile non vitiatur" 2.3. issue whether debt had assets - the verdict finds that he has assets beyond sea: beyond sea is mere surplusage (5 Bac 299. 2 Roll 714. Ao Jac 409. 6 Co 57.)

If the jury assesses greater damages than plff demands & judgment is arrested in pursuance of the verdict, it is error - But plff to prevent this, may release the surplus & take judgment for the residue. (10 Co 115. 5 Bac 195. 2 75. 2 1223. 4 1252. 3 Bulst 280. 120. 2 113. 123. 14. 132 143. Esp 304. Sta 364.)

Or the court to prevent errors, may without a release give judgment only for what is demanded (4 Bac 253.)

So if plff demand more than by his own showing, he is entitled to, & the jury find more, tho' less than is demanded, it will vitiate the judgment if rendered for the whole - but plff may remit the excess as before (4 Bac 26. 1 Roll 785. Sta 175. Allegn 29. 5 Bac 195. 272. Esp 304. 2 T. R. 110.)

If the jury after finding the facts specially make a conclusion of their own, the court is not bound by such conclusion; but gives judgment upon the facts found without regard to it. As if a question of seizure, the jury find some particular facts & conclude "so &c. was seized" (5 Bac 286. 10 Co 10. 49362.)

If in a civil cause there are two counts, one good & the other ill, & the jury find a bad verdict with entire damages, judgment is arrested and "venie de novo" awarded: for it is not known to the court how great a part is assessed on the bad count, or whether they were not all assessed on that (10 Co 130. Bull 3. Esp 528. 2 Wils 379. 1 T. R. 508. 532. 1 Roll 577.

Song 262. 1 B & P 329. 321. 2 H. Bl 318. 2 Bac 7. 1 Post 346. 4 33. Sta 174. Ao 22 328. 7882.

The Court. Court of errors lately decided that judgment shd not be arrested for 111
this cause: but this is not law - yet in this case the declaration wd be good on de-
murver: for one count is good, and the fault is not in the pleadings but in
the verdict (3 Bac 468. 1 Mod 271.) There is no contradiction then between this
and the former rule: whatever supports the motion in arrest, must support
the genl demurver, for that applies only to defects in the pleadings (contd)

But if several damages are assessed on the several counts, the plea may
then release those assessed on the bad counts & take judgment for the rest, (Id Ray 13)
But if the entire damages are assessed, yet if, no evidence was given on the
bad counts, the verdict may be amended by the Court from the judgment, &
so as to supply the good count only - thus an arrest of judgment may be pre-
vented (Doug 362. Sta 573. 15. 1 Lev 134.)

In all cases where judgment is arrested for a fault in the verdict, a ve-
nisse de novo issues, there is a new trial but no replader - for the fault is not
in the issue but in the pleadgs (Doug 362. 3 T.R. 564.)

In criminal cases if one count is good & another bad & a genl verdict
agt the deft, judgment is not arrested: - the reason for arresting judgment in
cases does not exist here - for the jury do not decide the punishment; -
but the Court will give judgment on the good count only: as if a person is in-
dicted for two larcenies in two counts for one indictment: one of wh. is ill;
on a genl verdict of Guilty, the Court will give judgment only for the one wh.
is well laid (2 Burr 985. 2 Hawk 627. Salk 384. Doug 703. Id Ray 886.)

In Court judgment is arrested for many extrinsic causes. i.e. such as
do not appear on the pleadings or verdict, or originally on the verdict at
all. This is nothing more than is done every day in Westminster Hall under
a little diff't form - call it a motion for a new trial & all would be
well. As for corruption or misbehaviour of the jury, as asking the op-
inion of third persons, finding upon the cast of a die &c vide Kirby 13. 133. 1804.)

So for misbehaviour of the parties to the jury, tampering with them &c
5 Burr 288. 291. Sta 642. 1 Vent 125. 1 Inst 227.)

So if one of the Jurors was entrusted with the result of the suit, or so re-
lated to the prevailing party, or his bail, as to found a principle challenge (Kirby 1804. 277.)

So if a Juror has been arbitrator or Attorney in the same case, or has given

his opinion on its merits, it is a sufficient ground for arresting judgment (Kilby 166.)

It is a general rule at Com Law, that any incompetency of Jurors, who goes to their impartiality & wd be a cause for a principle challenge, is a good ground for arresting judgment (Kilby 13. 153. 184.) But any incompetency which raises no presumption of impartiality is no cause for arresting judgment. e.g. want of freehold - the Juror might have been challenged. - But in capital cases want of freehold in a Juror will arrest the judgment; this is an exception in "*favorem vite*" (Kilby 184. Ste 249.)

And even if the incompetency does not go to the impartiality of the Juror, still if the party against whom the verdict is, knew the fact in season for making a challenge & omitted to do so, he is considered as having waived the exception, & cannot take advantage of it by motion in arrest (2 Sw. 232. Kilby 166. 426.)

But in capital cases, the rule is otherwise "*in favorem vite*". - If then one of the Jurors have before tried the same issue in the court below, the party against whom the verdict is, cannot arrest the judgment - for he is presumed to know the fact, since it always appears upon the record, and has waived the exception by omitting to challenge (it auct.)

The Court on motion in arrest of judgment can never go into the evidence on which the verdict was found, any more than in Eng^d. They must enquire into the facts, as the misconduct or incompetency of the Jurors (Kilby 61. 87. 142. 272)

It is said by Judge Swift that on an arrest of a judgment for the misbehavior of the Jurors or parties a repleader is awarded (2 Swift 264.)

But this is a mistake - the fault is not in the issue, nor does it yet appear at all upon the record - "*venire de novo*" is always awarded. -

A previous opinion disclosed by a Juror upon a general principle of Law involved in the issue, is no cause of arresting judgment, or even of challenge (Kilby 426.)

So if a previous opinion on the merits of a case, appears clearly not to have influenced the verdict: e.g. a Juror having expressed an opinion several years before - but declaring on an examination that he had forgotten it (Kilby 62. 2 Sw 232.)

In Eng^d as in Court verdicts are set aside & judgments arrested for causes not appearing originally upon the record: as the same cause in guilt pointed out in our practice & *abuse*. But in Eng^d they are called intrinsic causes

because the facts are enquired into by the Judge at "Nisi prius" & entered on the "Postea", so that when the motion comes before the court in Bank, these facts are part of the record. (5 Bac 288. 91. 2 St 622. 2 New 205. 13 Mungby 31.)

The same thing has been done in Eng^d in two cases upon affidavit (5 Bac 291. 15 Green 77) But a new trial is the usual remedy in such cases (5 Bac 280.)

In Conn. such extrinsic facts are alleged in the motion & found by the court in wh. the motion is made or evidence exhibited, & the same court decides both upon the ^{sufficiency} of the motion. So that the only difference between the common Eng^d practice & Conn. is that in Eng^d the Judge at N. P. finds facts & puts them upon the record, as the foundation of a subsequent motion in Bank, and that here the motion is made before the court in which the issue is tried, and the facts are ascertained on a subsequent hearing of the motion in the same court, & being found the judgment is then arrested:— for our courts all set in Bank — we have no "Nisi prius" courts.

The motion for a new trial however in the more liberal way, has the same effect & is becoming common in Conn. &c.

In arrest of judgment for defects in the pleadings no costs are regularly allowed on either side (probably if the motion in arrest was occasioned by the misconduct of the party agt whom it prevails costs wd be allowed. I. Gould.) for the party agt whom the motion is decided is unsuccessful — and the party arresting the judgment might have taken the exception sooner & saved the expense of the trial (Saek 579. Sta 617. Kirby 87. 1 Post 67. 70. 573.) 1 Chy pl. 633..

The rule is the same & for the same reason, where the motion is overruled in the court below, & the party brings a writ of error & prevails (1 Clift 638. 9.) This writ of error is founded on a mistake in the motion in arrest, and no plaintiff can recover costs on a writ of error. —

This rule does not apply to arrests of judgment in Conn for extrinsic causes: as for the misconduct of a juror — for then it is not the fault of either party. — 1 Post 417. there is a second trial on a venire de novo, & the whole costs follow the final verdict.

According to the former practice in Conn. when an issue in fact is closed to the court there could be no motion in arrest of judgment — for under that issue, the court decide on the sufficiency of the pleadings, & finding the issue, immediately give judgment. (2 Swift 204.)

But it is now decided by the court of errors that exceptions to the pleadings cannot be taken under an issue in fact tho closed to the court: - that the issue must be first found by itself, and afterwards there may be a motion in arrest of judgment: - that leaving the issue & the finding in the first instance on the pleadings is ~~error~~ (Court of Errors 1817.)

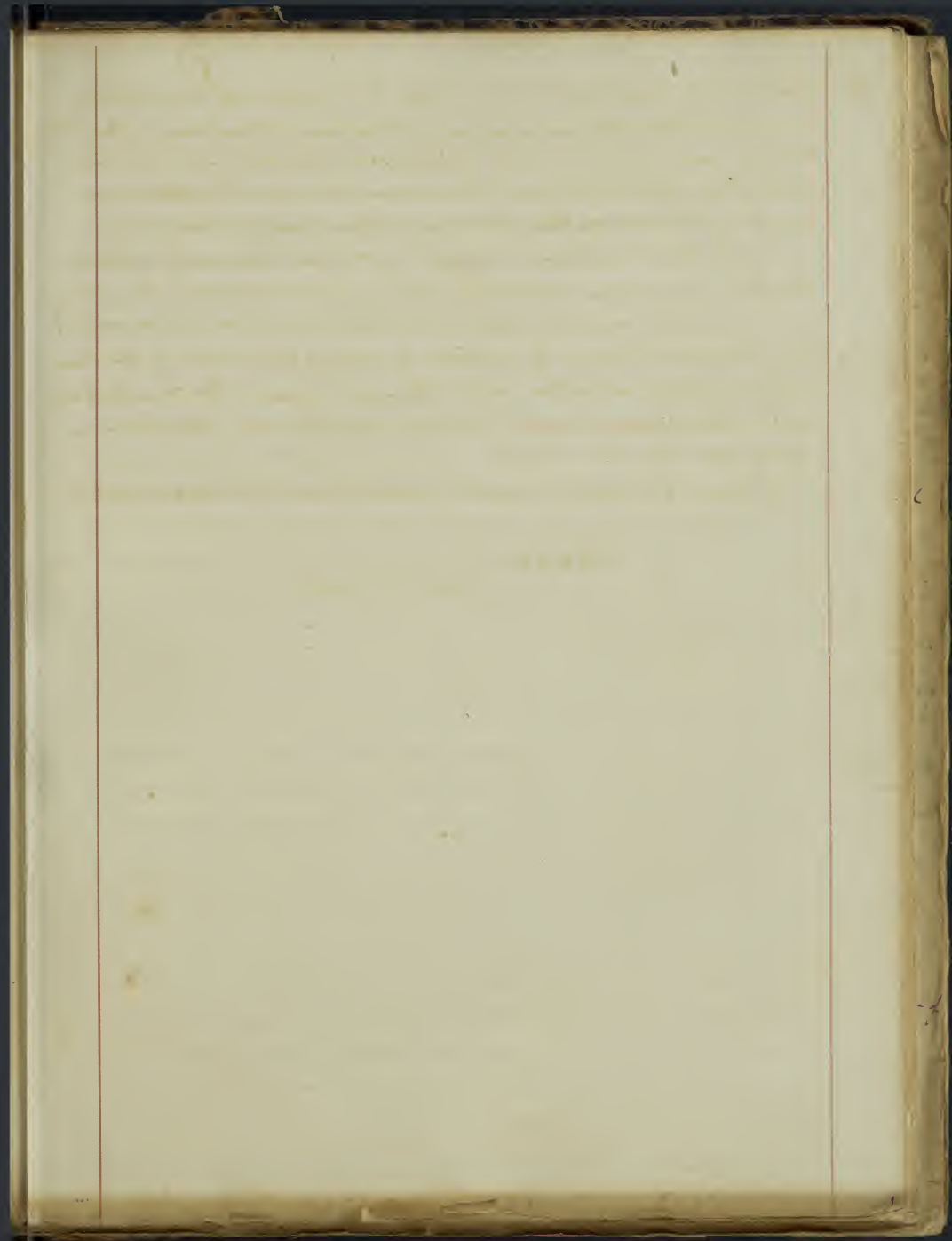
In Eng^d motions in arrest of judgment are made within the first four days of the term next after the trial at N.P. (3 Blesso.)

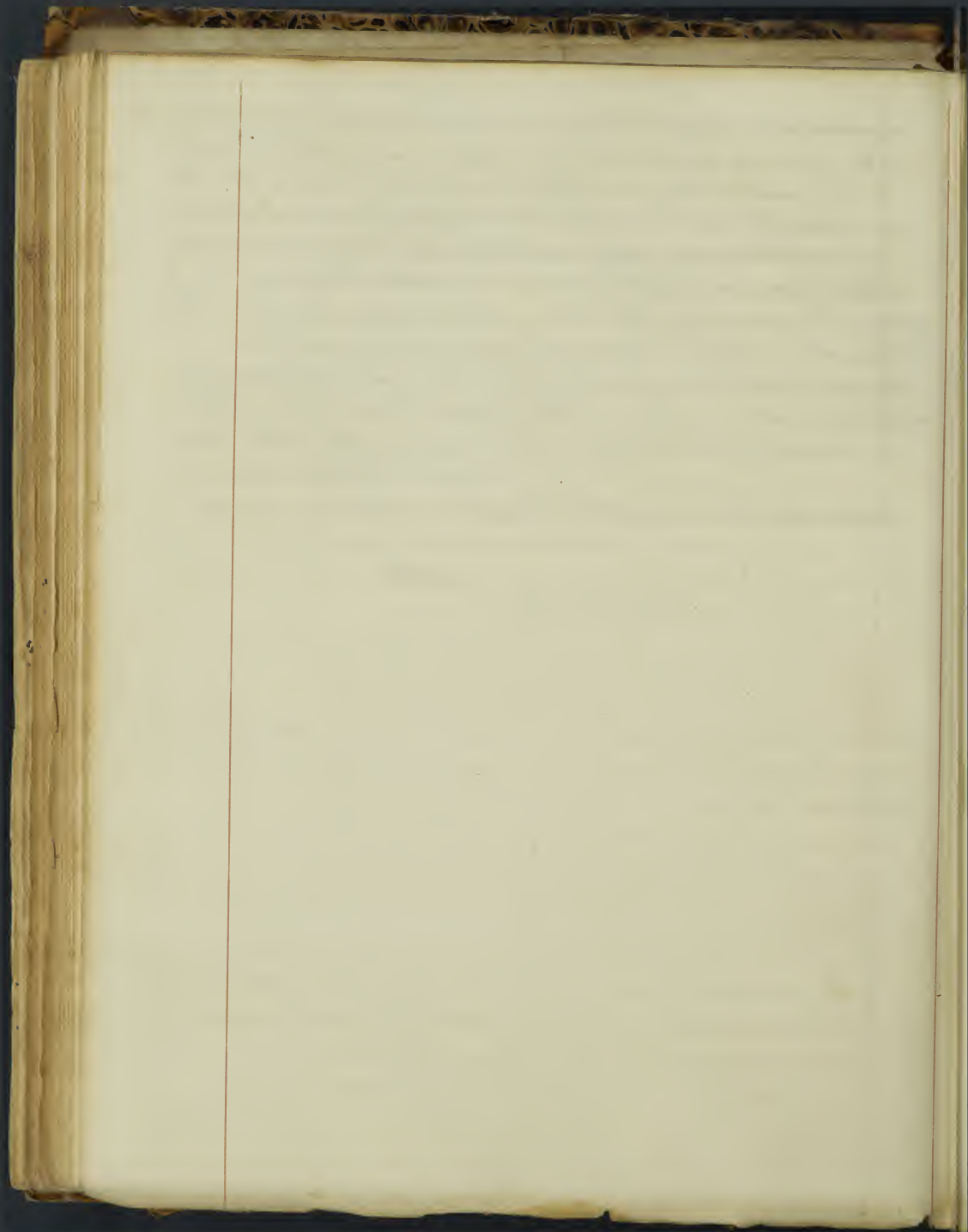
In Conn, by rule of court, the motion is made on the verdict being accepted, & must be reduced to writing & delivered to the other party, or lodged with the clerk within 24. hours in the county court & 48 in the Superior court; & always before the end of the term. C. Kirby 235. Rost 72. s. Day 28.

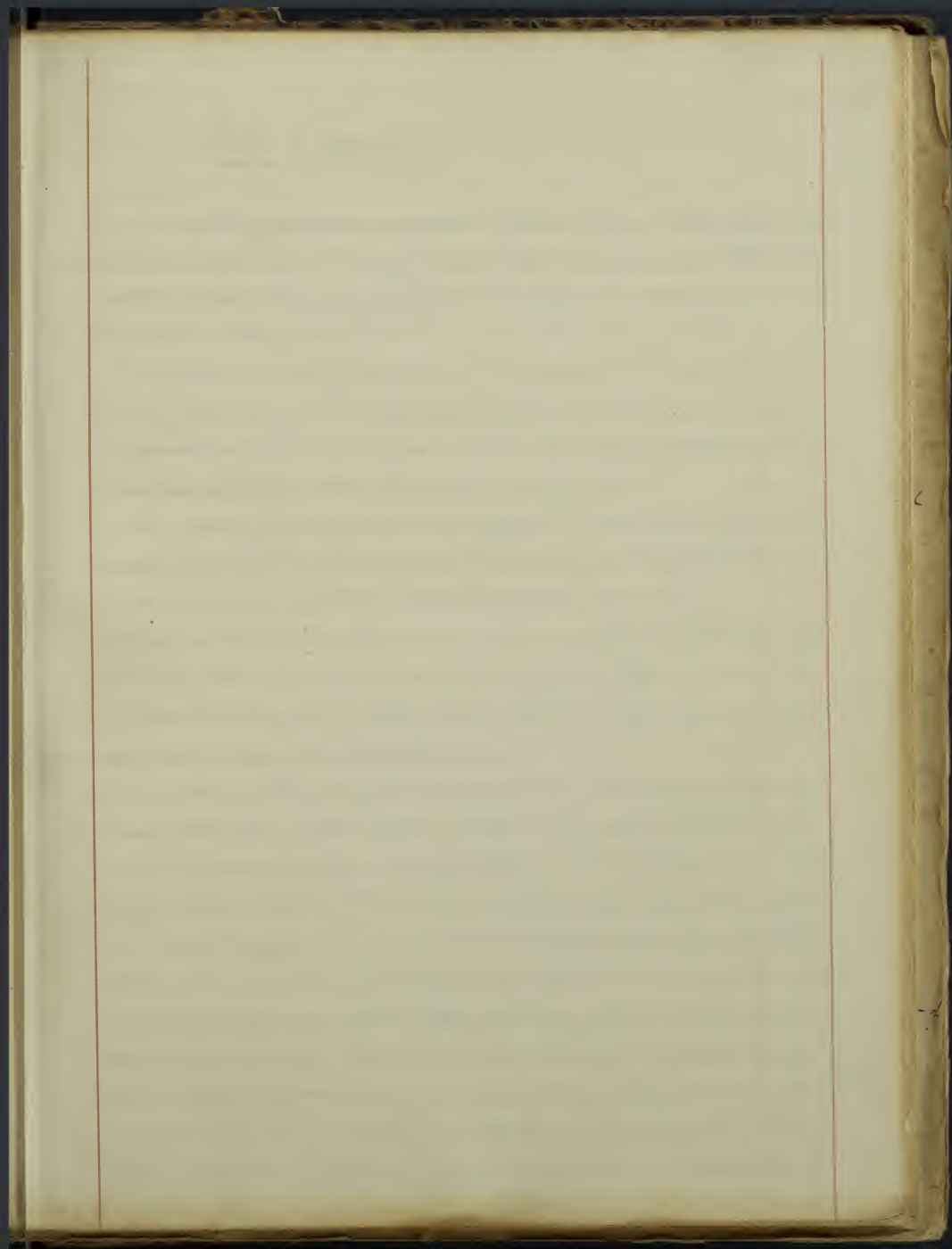
For Form of Motion in arrest of judgment vid 3 Blesso Appx Roll. P. 11

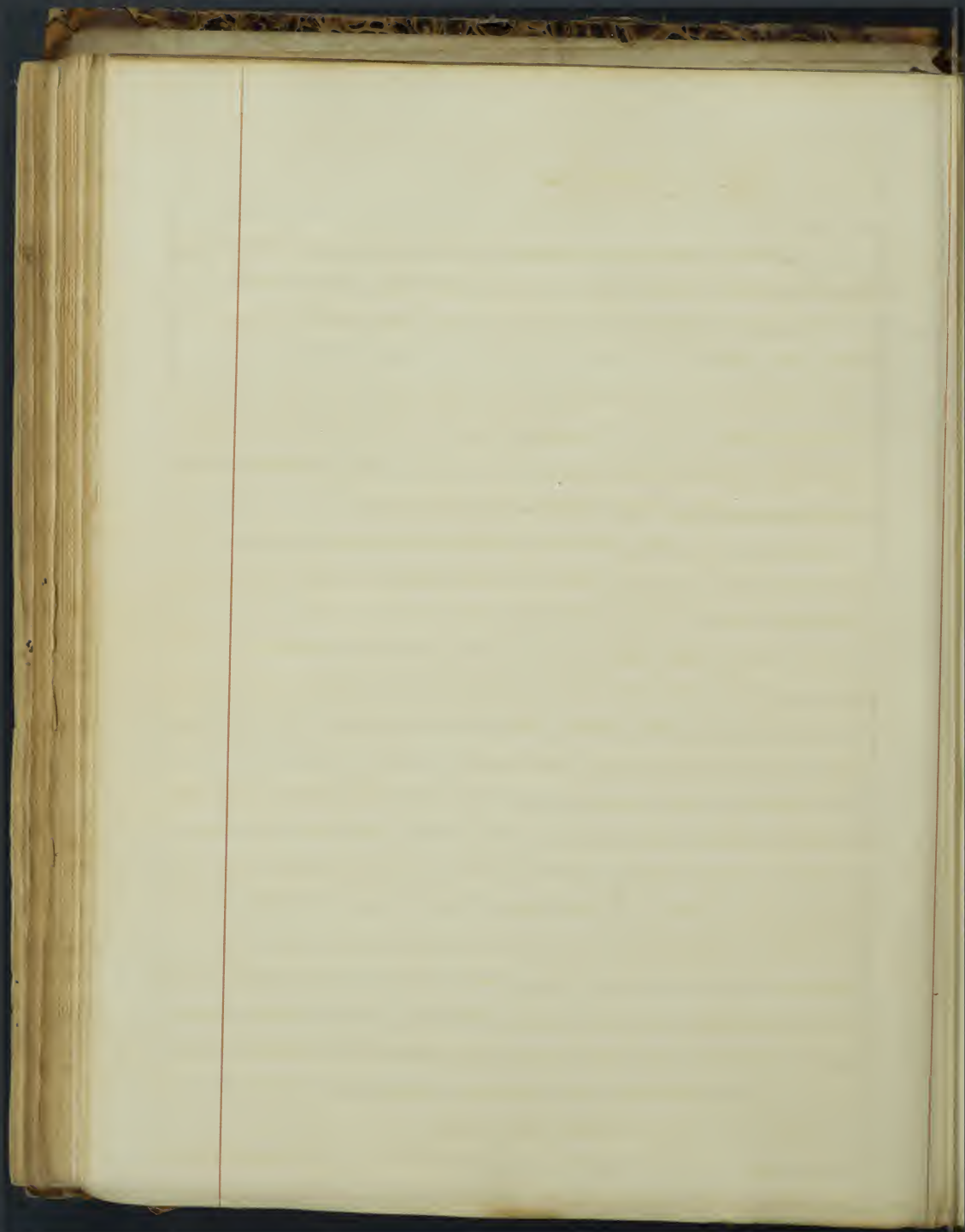
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Bills of Exceptions

A Bill of Exceptions is a statement of facts (doomed interlocutory judgment decision a direction in point of law, founded upon them) annexed to the record, for the purpose of laying a foundation for a writ of error (3 Bl 373. 1 Bac 325 4 Bull 136. 9 Co 13 137)

This statement consists of facts not originally appearing on the record, but which are the foundation of some interlocutory judgment, and which the party of whom it operates, supposes to be erroneous; and is called a Bill of exceptions, because it contains exceptions to the interlocutory judgment.

This mode of founding error was unknown at Com. Law. It was introduced into Eng^d by Stat Westm. 2^d 13 Ed 1. c. 13. (of which that it is the creature of Stat 4 Ed. 1. 9 Co 13. b. 1 Kirb 324. Bull 315. 1 Bac 325. 3 Com 372.)

We have no Stat on this subject in Conn, but the Courts have adopted the Eng^d Stat as one of those old ones considered as forming a part of the Com. Law. (Kirb 168.)

This Stat is also probably adopted either by the Ct of Justice, or by some Legislative act in most of the States of the Union.

The object of a Bill of exceptions being to found a writ of error, it follows that it cannot be filed or taken except in Ct from which a writ of error lies. En. g. Not in ^{the} Jud of record in Eng^d, or Courts of probate, or of Commissions in Conn. (Bull 316. 1 Bac 327. Post 16.) This Bill may be taken in all Courts whose judgments are liable to be reviewed by a writ of error: as in Eng^d in Com. Pleas, Kings Bench, Exchequer &c, but not in Chy, it being a Court of record; and it has been doubted by some whether it might be filed in the Kings Bench in Eng^d, the proceeding being "coram regi". But I conceive that according to principle it may as well be filed in that Court as in Com. Pleas - (1 Bac 96. 2 Lev 237. 2 Ston. n. c. 147. 287. Bull 316.)

In the U. S. it may be taken from all those Courts from which error lies. (Kirby 289. 2 Johns 117.) In Conn. they may be taken in Superior Court or Justices Courts - some doubts as to Justices Cts. Why? Kirby 289. no reason

for it, it is a court of record. -

Overruling an offer to swear to evid. (properly made) is an error for wh. a bill of exceptions may be filed (11 Bac 326. 4 B 136. 9 Co 13 b.)

Also a misdirection to the jury by the Judge in point of Law in Eng^d is a good foundation for this Bill; tho' much more commonly remedied by a motion for a New Trial; both here & in Eng^d in modern practice (11 B & P. 565. 6. 2 H. Bl. 288. 2 N. Rep. 1.) So if evid. objected to, is admitted or rejected, a bill of exceptions may be taken & filed by the party or whom the decision operates. -

It is also a ground for a new trial - and as the admission or rejection of ev. is a point of Law, it may be the order of a Bill of exceptions or of a New Trial. But the more convenient & (now) more usual mode is to move for a New Trial. (11 Bac 326. 2 Lev 237. 276. Kirk 168. Bull 316.)

But if the Judge admits the party's evidence, bill of excep. is not allowed: because he did not direct the jury to find upon it, even if the ev. of it was a record (wh. is always conclusive) and he did not tell the jury that it was so, or in fact take any notice of it (11 Bac 326. Bull 316. Ray 405.)[†] It is more neglect - not error. -

So if oath is refused, when in the opinion of the party, it ought to be ordered: - But in this case, advantage is usually taken of the refusal, by entering the prayer of Oath on the record as a kind of plea (Pleadgs 105.) or demur when it ought to be denied, a bill of exceptions may be filed. The latter clause of the rule appears incorrect as in pleas. (Pleadgs 105. Oath.)

So in the case of allowing or overruling challenges to jurors (5 Bac 325. 2 Solst 429. 2 Oyer 231. Ray 486.) for this also is a point of Law, and if incorrect may be objected to. -

But to an interlocutory judgment relating to mere practice, this bill of exceptions cannot be taken. as. continuance of a cause, compelling party to plead, ordering or refusing to order security for costs &c. (Ct. sup. in.)

So when the decision of any kind is discretionary with the court, as in the last case, granting new trials (Kirk 41. 316. Rost 290. 11 Bac 327.) imposing terms of granting them &c. of these errors is not predicable, & so a bill of exceptions is disposed: -

these cases there is no principle of Law involved, the violation of wh^{ch} is essential to the ground of error: they are therefore matters altogether discretionary with the Court.

Suppose a New Trial granted in a case in wh^{ch}, or by a Court where it is not by com. Law grantable, in any case & under any circumstances will not err lie? & p. gr. by Justice of the peace post 27. 47. C. J. B. thinks it would, & therefore a bill of ex^{cept}. will lie. 3

And as a gen^l rule, a bill of ex^{cept}. cannot be allowed to any decision of a Court that is entirely discretionary; for of such Judgment error is not predicable: hence a bill does not lie for not granting a new trial, for this is an application to the discretion of the Court. If a new trial ~~shd~~ however be granted, in a case in which a by a Court where, from the very nature of it, it is not grantable, error wd be predicable of such a decision. — as if a new trial ~~shd~~ be granted in a criminal case after de^{ft} acquittal; & if a Justice of the peace sh^d grant a new trial: Thus the determination of that Court must be entirely discretionary (viz.) such that the rules of Law wd justify in determining either way. —

In prosecutions for Misdemeanors, as de^{ft} if acquitted cannot be tried again, there wd seem to be no use in the prosecutor's filing a bill of ex^{ception}: But as de^{ft} if convicted, may be entitled to another trial in many cases, may he not in such cases file his bill of ex^{ceptions}? (post 75.)

Bills of ex^{cept}. are not allowed in prosecutions for treason & felony: for the Judges, it is said, are counsel for the prisoners, & must see that Justice is done them: an extraordinary reason indeed, where the bill is founded on the supposed error of the Court. Another reason is that the benignity of the com. Law will not allow a man to be twice tried for the same offence. But the true reason is that the Stat of Westm. 2^d authorizing bills of ex^{cept}. does not extend to such cases & of course does not give the Court any authority to grant a new trial (1 Sid 184. 1 Lev 168. Kelt 524. Ray 486. 1 Bac 325. 1 Mc St. 325. trial per pais 326.)

It is now the practice of com. Courts & indeed has been of the U. S. circuit Ct^s, to grant new trials in favour of the prisoner, & if this be done, I see no reason why a bill of ex^{cept}. might not be filed in his favour: that it cannot be filed ~~on~~ him, I shall observe more particularly when

118 treating of the subject of new trials.

But on the question whether a new trial may be granted on indictments for offences not capital, the authorities are divided (1 Bac 323. 2 Show 242. 1 Leon 5. Vent 366. Bull 316. 1 Lev 62. Kirby 229. 1 Mc N 326. Ray 486. 1 Sid 85.)

Thus much however is settled, that on an indictment for a mere trespass and breach of the peace, a bill of exceⁿ is allowed (1 Leon 5. 1 Bac 325.)

I conclude however, that even in this case it wd be allowed in his favor only and not of the prisoner.

When a Bill of Exceptions is allowed, the ^{court} regularly will not allow the party filing it, to make the same exception the ground of a motion in arrest of judgment, i.e. it will not suffer the party to move in arrest of judgment on the point on wh the bill was allowed. Having once given their opinion the parties only remedy is by writ of error.

This rule is sometimes dispensed with in B. R. (Bull 316. 17. 1 Bac 327. 2 John 117. 1 Vent 366. 2 Lev 237.) Note. By motion in arrest of judgment on the same point must be meant a motion founded on the Bill of exceptions. i.e. on the point brought on the record by the filing of the bill containing it.

The object of the bill being to draw before a higher court, a judgment on some collateral point, it is regularly not allowed to embrace genl merits of the cause; i.e. to draw the whole controversy into a future examination. Therefore a bill made out after judgment, and containing a genl statement of the facts & agreements is inadmissible, tho sometimes practised: but only such special facts & points of law as are excepted to as being erroneous: and shd the Ct below certify such a bill, yet the Ct above will quash the writ founded on it (Cowp 161. 136 R. 555. Bull 316. 12. 7 Rep 529. 1 Morg 281 486. 1 Sta 276.)

Qu. Should the proper course on motion to quash it?

The Bill is authenticated in Eng^d by the signature of the Judges, or one Judge in Eng^d who appears in the Ct above & acknowledges his seal (1 Bac 325. 1 Bos & P. 32. Cowp 161. n.)

In Conn. it becomes parcel of the record in the Ct below & is exemplif-

id with the rest of the record. and the common practice is to state not only the 119
interlocutory Judgmt & the simple facts, but also the ground of the exceptns &c wh
were taken at the Trial. - But in Eng^d it need only contain a statement of the
interlocutory Judgmt or direction, & of the facts on wh it is founded. If the facts
are truly stated the Judges are bound to certify, i.e. to sign it; otherwise not, & if
they refuse to sign, a Mandamus issues, by stat Westm. 2^d to order them to
sign (1 Bac 228, Corp 161. 2 Lev 237. Thompl 116. Ju. does this writ lie in Court?)

Formerly it was certified by the chief or presiding Justice: Now, there is un-
iversally a motion made for a new trial by a rule of the Sup.^r Court; the
propriety of wh is very questionable. -

In Eng^d the bill itself, or at least the substance of it reduced to
writing, must be tendered at the trial. (Bull 315. Holt 351.)

In Court a party must give notice of his intention to file a bill (Rosh 589.)
or move to file a bill when his cause of exceptns accrues. And the Bill must
be filed within 24 hours after the verdict is recorded in case of trial by jury,
and within the same time after Judgmt, when tried by the Court (2 Lev 266. Rosh 589. 70.)

A Bill of except^{ns} is not itself a "supersedeas" of the Judgmt, but merely en-
ables the party finding it to obtain a supersedeas, by the allowance of a
writ of error (1 Bac 327. 1 Mod 630.)

For the form of a Bill of exceptions vide Bull. N. P. 217. The form in Court is
"County ss. Bill of 24th. As vs B. action of &c plea of &c; on the Trial of wh cause plff
&c offered in and &c. Deft objected &c; stating the Ground: Court decided in favor
of plff &c & now deft excepts &c & prays the Judges to certify &c." This becomes
part of the record & lays foundation for a writ of error. In Eng^d it is a part
of the record of the Court below (1 Bos & P. 32.)

A Bill of except^{ns} is only one mode of founding a writ of error. There are
several other foundations, & by far the greater proportion of writs of error are found-
ed on extrinsic facts, not appearing originally on the records. -

Finis.

Writs of Error

The Eng^l writ of Error is a commission to the Judges of a superior court to examine the record of the court below on wh^{ch} final judgment had been passed in that court, to affirm or reverse it, according as the law shall direct; & it may be brought for such facts as originally appeared on the record, & also for such facts as are embodied in a Bill of Exception. 2 Bac 187. 3 Bl 407. Jenk 25. 2 Inst 40. *Yelow 209.*

In Eng^l the writ of error does not summon the deft in error to appear & answer. It not being an original writ, but is directed to the court above and the deft is then summoned by the court, by a "Scire facias ad audiendum errores" (2 Bac 207. 216. 3 Bl Appx. *See* in Comm (2 Sw 276.)

In Comm it is an original writ, summoning deft in error to appear & ~~hear~~ the original record read, & the causes of error assigned. &c. (ib)

When founded on some mistake in the legal opinion of the court below, it is brought for the reversal of such judgments only as are rendered upon some point of law appearing upon the face of the record. But not to rectify an error in the determination of facts, or the weighing of evide. 2 Bac 189. 5 Com. 286. 1 Roll 746. Ho. 22 233. Dyce 38. 1 Leon 233.

By the term "writ of error" ~~now~~ without more, is regularly meant one of the above description; i.e. one founded on an error apparent on the face of the record (2 Bac 187. 2 Bl 407.) But there are writs of error founded on errors in fact, i.e. not apparent on the record below. -

If on reversal P^lff in error can recover or be restored to any thing in the nature of a debt or damages, or any thing real, as land; the writ of error is considered in nature of an action to recover the debt &c. so that a release of all actions wd be a good & sufft bar to the writ. *Aliter* if its object is only to recover a judgment of reversal & costs incurred in the court below. Here it is not considered as an action, & so such a release will not bar it. (1 Inst 286. 2 Bac 187. 225. 8 Co 152. 1 Roll 788. 2 Roll 405.)

There is another species of writ of error, founded on matter of fact dehors the record. This writ can be brought to such courts only as are capable of trying an issue in fact:—for the error being founded on some intrinsic fact, the existence of the fact must be ascertained by a jury, as the Court of King's Bench or even parliament in Eng^d; but not in the Exchequer Chamber, for that Court has no jury. *2 Bac 218. 1 Vent 207. 2 Tw 38. 2 Bac 218.*

It may also be brought in the same court where the former judgment was rendered, i.e. the judgment complained of as being erroneous, & this is the most usual course. It is called a writ of error "coram vobis" or sometimes, "coram nobis."

This is not strictly brought for an error of the Ct; but consists in an error on some extrinsic fact. *Et. gr.* Judgment as a feme covert alone, the Court not knowing of her coverture. The Baron & feme may join in the writ of error to reverse the judgment, either before the court that rendered it, or a higher one. So also if of an infant without his having appeared by Guardian *ad prochein ami* *3 Bac 157. Carth 112. 179. 20. Kirby 116. 3 Bac 157. Talb 400. 2 Roll Rep 53. 3 Com 177. 1 Vent 207. 2 Bac 193. 247. 18. 223. 4 Bac 33. Helo 58.*

But a Court will always appoint a Guardian "ad litem" on information of his infancy (*Pl. 20. 1.*)

So if deft die "pendente lite" & judgment rendered, the Court not knowing of his death (*6 Bac 143. 2 Bac 218. Ray 59. 5 Com 286. Kirby 232. Carth 338.*)—If Sheriff return that the original party is alive, he may come in to Court and plead in mallo est erratum (*Carth 339.*)

So also if the Judge who gave judgment was interested in the event of the suit, advantage may be taken of this extrinsic fact by a writ of error (*3 Com 177. Sta 639.*)

So also if one sues & recovers as ex^r of d^d. he being still alive, a writ of error will lie to reverse the judgment, either before a higher or the same court (*3 TR 129. Sta 639. 1 Roll 744. post 13.*)

A writ of error will not lie on any judgment of a court which is not a court of record, for the memorials of such courts are not considered as of high authority as records (*2 Bac 194.*) as county courts in Eng^d (*Co Litt 286. b.*)

nor will it lie on a decree of a court of chancery in Eng^d 2 Bac 194. Bull 235. 5 Com 289. 1 Roll 744.) for this is not a court of record, & the only mode by wh^{ch} such decree may be reversed in Eng^d is by an appeal to the house of Lords. -

But in a judgment given in the petty bag office it will lie - for this court proceeds according to the Com. Law & is a court of record (2 Bl 483. 2 Bac 194. 1 Roll 744. Dyer 315. Mod 570.) It lies on a judgment of nonsuit & also on one by default Dyer 23. a. Sta 285. 1 Roll 744. 1 Bl 432.)

By a stat Law of Coun error does lie (i.e.) is predicable of a decree in Chy. The stat does not however ~~extend~~ make it a court of record, but by a positive provision allows error to be brought on its decrees. In Com this writ will lie from Justice's & County Ct's to Sup^r Ct & thence to Ch of Errors. -

Kinds of error

I Error in matter of Law apparent on the face of the record.

II Error in matter of fact not thus appearing. -

Still however, assigning errors in Law & in fact together in the same writ is ill. (2 Bac 217. 3. 5 Com. 300. pl 3. 15. 1 Bl 766. 15. d 147. 93. Leon 115. Ray 231. 1 Vent 253.)

for they require diff^t answers & diff^t trials - matter of Law by the Court & matter of fact by the Jury (2 Bac 217. 18. Gelo 53. Sid 93. Ray 57.) this blending of matter of fact & of Law is called "Duplicity."

But tho' matter of fact & of Law are blended in the assigning of errors, yet if the deft in error pleads "in nullo est erratum in record", he loses the advantage of the double assignm^t, & waives all exceptions to the duplicity: for a plea of this kind gently confesses the facts assigned as error. It does not traverse the extrinsic facts, & of course admits them - There is room for but one trial & perhaps not that, for the confession may preclude the necessity of it. -

If Deft wd take advantage of the double assignm^t, he must demur to the writ 2 Bac 218. 207. Carth 388. 9. 1 Vent 252. 1 Lev 6. 6 Mod 113. 265.)

But it is said that a genl demurmer wd reach the defect, tho' it is called "duplicity" & the reason is that duplicity in a writ of error, is not within the Stat^y. 27 El. wh^{ch} requires a demurmer for duplicity to be special (1 Bac 95. 6. 2 Bl 213. Carth 388. 4.)

.. If the successful party shd assign several errors in fact as, Infancy

& contain at once it wd amount to duplicity, either of them being suff^y to arrest judgment, & on each there wd be a distinct issue, as there always must be for every error in fact (5 Com 300.) Decid when several errors in law are assigned. Duplicity is not predicable of more matter of law: for there can be but one issue, & that reached thro' the whole record. The Genl plea "in nullo est" answers the whole pleadgs. But for every error in fact assigned, there must be a distinct issue (5 Com 300. pl 315b.) so that where the causes of error are such as appeared orig^l on the record, any number may be assigned without duplicity, Com pl 615.

If an error in fact is well assigned, deft in error must traverse it: for the plea "in nullo est" merely virtually confesses the fact to be true. Thus if plff in error pleads that he was an infant, plea "in nullo est" confesses it. Aliter if not well assigned; then such plea does not confess it; as if the assignmt contradicts the record (Post 18.) & alleges a fact not assignable for error.

If plff in error assigns as error, any fact wh in law does not amount to it, deft need not traverse it: for the admission of such fact can't injure him.

Decided by Sup. Court of Conn. that assigning with suff^y errors in law & errors in fact wh are not assignable, does not vitiate the writ: this was on spec^l dem. (Riley 27.30.)

And in another case in plea in abatement, founded on the plead^g of errors in law & in fact, Sup. Ct ordered the assigning of the errors in fact to be struck out & reversed the judgment for the others (Post 262. 2 Ser 277.) This decision is not warranted by any of the Eng^l authorities, nor does I. G. think it will be regarded as law in Conn. now.

An assignmt of errors in fact wh. contradicts the record is not good. (2 Bac 215. 1 Roll 457.) ex. that the court did not sit on the day of the judgment. So also that plff in error did not appear when his appearance is entered on the record (As Car 12. As Bac 588. Rib 134. Hob 204. 1 Roll 672. 762. As 22 469. Dyer 89. Ray 231. 5 Com 301. Talk 262.)

So an avermt that the judge died before judgment is inadmissible, because it contradicts the record, & therefore the plea "in nullo" don't confess it.

It is a genl rule, that a deft in an action cannot assign for error what

he might have pleaded in abatement to the original action, unless he has so pleaded it, & his plea has been overruled. In such cases he may assign for error the interlocutory judgment on his plea: but by failing to plead the matter in abatement he waives it. 6 T. R. 766. 2 H. Bl. 267. 299. Carth 124. vide pleas in abatement.

Where an error in fact is assigned, the only proper conclusion of the assigning is an averment "*hoc pariter est de*" (Bac 612. Carth 367. 1 Com 300 vide Gels 58. 2 Bac 218. contra that the conclusion sh^d be to the country. -

But there seems to be an absurdity in this, for what issue w^d be formed there? the new matter is not traversed: thus if infancy is assigned, pl^{ff} cannot make this conclusion, for there is no issue, no one has said as yet, that he was not an infant. Here new matter is alleged, as de^{ft} does in a special plea in bar & sh^d be concluded in the same way, with a verification. - The case in Gels therefore, cannot be law. -

By an Eng^l sh^d a special plea of bankruptcy concludes to the country; this however is a solitary instance. -

It is a gen^l rule that where an error in fact (abatement) is assigned, a writ of error "*coram vobis*" ~~lies~~ 5 Com. 286. 1 Roll 767. & as in cases of infancy and coverture *supra* 4 Bac 39. 2 Bac 215. 18. Salk 400. 3 Com 177.)

So if one sue & recover a judgment as ex^r or adm^r of d^l. & he being alive - (1 Roll 676. 2. Lev 38. 1 Vent 237. 10 Jac 5. ante 15. &) and altho it may be carried to a higher court, yet a "*coram vobis*" is the most usual way in these cases. But this rule can not hold when the Ct rendering ^{the} judgment, cannot try an issue in fact, as the Exchequer chamber.

But Gen^l if the error is in law, the "*coram vobis*" does not lie: since it w^d be no less than to ask the court to reverse their own decision on some legal point. (3 Bac 215. 5 Com 208. Moore 186. 1 Sid 208. contra Lev 149. 1 Roll 309.)

There is however an exception to this rule viz. when the error is occasioned by the default of the clerk of the court, a pl^{ff} or other officer of the court (1 Roll 446. Fitts 21.) for in these cases, the error does not proceed from the act of the court, tho' apparent on the record. Here a "*coram vobis*" will lie

for an error in law, since in these cases the error does not proceed from any fault or mistake in the Ct. & is not strictly an error in the judgment of the court. If it was the fault of the court *error coram vobis* wd not be 5 Com 286. Roll 746. 4 Moore 186

So if the error is in the process "*error coram vobis*" lies: for this is not an error in the judgment of the Ct. The original judgment is given only on the pleadgs of wh the process formed no part. If there fore the judgment is entered by a defect in the process, it is not a mistake in the opinion of the Ct. 2 Bac 215 5 Com 286. 3 Bl 279. 7 N. R 21. 10 Pl 181. (Roll 746.) Process what? ord 3 Bl 279.

The old rule as to the time of bringing a writ of error is, that that be brought on an interlocutory judgment, the writ could not issue till final judgment: for the party might prevail after such judgment or lose, & thus supersede its necessity. But the present rule in Eng^d is that the date of the writ may be before final judgment - so that there cannot be any proceeding on the writ, until it is ascertained that judgment has gone vs the plff in error, in the Court below 2 Bac 199. 1 Vent 255. 2 Kebl 228. Latch 133. 1 Sid 104. 406. 17. R 280. Sta 807. 1d R. 154.)

In Conn the old rule prevails and must of course prevail: for in that state the original judgment must be recited on the writ of error, and it wd be impossible for a party to anticipate what that judgment might be. Hence it has been decided that the agreement of the parties to dispense with final judgment shd not supersede the rule c Root 157. 290.

It is a genl rule that where the judgment, or several joint defts, all of them must join in the writ of error to reverse it c Carth 367. 1 Roll 769. 5 Com. 290. 2 Bac 198. 9. Sta 406. Carth 7. 8. 3 Mod 134.)

And if one shd refuse to prosecute the writ, there must be a summons & severance; for an entire judgment must be reversed in toto, or not at all. It wd be vexatious & inconvenient that each shd have a separate writ.

But in Conn the Sup. Ct & Ct of errors have reversed a judgment as to some of the defts & affirmed it as to others. 24. where there was a joint judgment or several, some of whom were adults & others infants: Reversed quoad the

the infants only as they pleaded by Attorney. (Kilby 114.) But the com. Law rule is otherwise (2 Bae 198. 228. 1 Roll 776. As Bae 289.) Is it not the com. Law rule correct on principle? had not the infants been parties, damages might have been much less. -

If the parts of a judgment are divisible in their natures, it may be reversed in part (not as to the parties but as to the subject matter) and remain good as to the residue (Sta 189. 308. 4 Bae 2022. Kibb 116.) ex. when a judgment is rendered for costs and damages in a case where costs by Law are not recoverable, it may be reversed quoad the costs & affirmed quoad the damages (Carth 78.)

So according to Com. decisions, if the judgment is severable. ex. erroneous as to part of the costs; as where there shd be no more costs than damages. -

So if judgment tho' not actually separate, is severable into parts by any rule, it may be severed & reversed as to part & affirmed as to the residue (Post 138.) case in Kilby 104 is contrary to principle. That the com. Law rule is otherwise vid 2 Bae 198. 237. 1 Roll 767.)

It is a genl rule that no person can bring a writ of error except a party or privy to the first judgment (2 Bl 355. 5 Com 291. 1 Roll 748. 755) as being exrs, admrs, grantors & grantees, particular ten's & remaindermen. (2 Bae 195. 1 Roll 748. 9. Dyer 90. 1 Sid 217. 2 H 56. 1 Leon 267.) for privies. vid error.

The same rule holds as to debts. It is precisely reciprocal: and the privy who brings the writ must be a privy in relation to the subject-matter; as the heir, when the subject matter is an estate of inheritance. ex. &c when it is personal as debt or damage. -

It is a genl rule that no person, tho' a party to the origl judgment, can reverse it, unless the error was to his disadvantage (2 Bae 195. 9. 200. L. S. B. 21. Hob 70. 5 Coke 39. 8 id 59.) Therefore, if one of several debts obtains judgment, he cannot join in a writ of error to reverse the judgment rendered as the others (2 Bae 197. 200. Sta 372. 1 Lev 210. Hob 70.) they alone must bring the writ (Cowp 425) for he has obtained all that the

Law allows him, that is his costs -

Exceptions. There are cases however in wh. the prevailing party in the court below may main tain a writ of error in the court above; as where the error is the fault of the court, and alters the manner or form of the judgment. ex. omitting to amerce the party when he ought to be amerced. This is allowed not for the purpose of doing justice to the opposite party, but on the ground of great expediency, in order to regulate the manner of rendering judgments C Hardw 51. Sta 971. 7 Mod 189.]

So if on a verdict giving damages & costs, judgment is entered for damages only, prevailing party may bring a writ of error (2 Bac 320. 5 to 79. 8459 1 Roll 759. 40 Jac 211. Leck 211. Gelo 107.)

In these cases the judgment is itself defective & incomplete; hence the party in whose favor it is given may reverse it.

But it may be asked, why the party who is not injured, can bring a writ to reverse the judgment? the reason is that the judgment is incomplete, and another party concluded by it. So if on conviction of two debts, the whole damages & costs are adjudged to one only, the other may assign it for error. Gelo 107 Hardw 51. 7 Mod 189.] So a plaintiff may assign for error the want of jurisdiction in a court in wh he himself brought the action (2 Cranch 126.)

In all these cases, the proceedings are irregular, & either party may reverse the judgment. -

By a "supersedeas" is meant a suspension of the right of the party prevailing below, to take out execution, or to proceed under it, when already issued.

In Eng^d it seems to have been formerly held, that shewing a writ of error to the adverse party, operated as a suspension for four days (being the term prescribed for obtaining from the clerk in error an allowance of it Roll 472.) 3^d Bac 210. 17. R. 200. 1 Bos & P. 478. 1 Vent 255.]

But it seems that at this time, a writ of error is no supersedeas to the judgment in the court below, until the writ is properly allowed by a GR of errors 17. R. 280. 1 Bos & P. 478.]

But the allowance of a writ of error, operates as a "supersedeas" only for four

days after judgment signed, ~~that~~ being the time allowed for putting in bail in error, and if bail in error is then put in, the supersedeas continues - secus not. ITR 280. n. and ex^{te} may be taken out & proceeded on under it. -

Bail in Error, is intended as security to the debt in error, for satisfaction of the original judgment in the court below, in the event of its being confirmed: otherwise plaintiff in error might have an opportunity to place his person & effects out of the reach of debt in error, before he could obtain an affirmation of the judgment; so that there is no supersedeas until bail is put in. -

In Eng^l the recognizance of bail is with two sureties in double the amt^t of the judgment. It is regulated by Stats 3 Chap II & 13. 16. 17 Car 2^d c1 Bac 212. This bond is meant to secure the debt in error, all damages, debts, interests & costs to wh. he may be entitled on the affirmation of the judgment, & to all wh the bond men become liable c1 Wils 981.0

The writ of error is good tho supersedeas be without bond (2 Day 370) sed Quere.

In Conn if there is a sufficient recognizance with surety entered on the writ, it operates as a supersedeas, from the time it is served on the debt in error: but is no supersedeas until service (2 Day 370.)

In Eng^l Ex^{or} &c when plaintiff in error on a judgment or them "de bonis testatoris," &c may have a supersedeas on a writ of error without putting in bail c1 Bac 672. 3. Co. Jac 350) Because a writ of error in this case, brought by such a party, is not within the stat wh requires bail in order to make the writa super^l

In Conn they have no such stat. consequently there is no difference between Ex^{or} &c and other persons: but they must procure bonds like other plaintiffs in error. In Conn the writ becomes a supersedeas of the execution in the hands of the Officer, by leaving a copy of it with him. -

There was formerly no rule settled in Conn. as to the time of pleading in abatement of writs of error. They were admitted within the time allowed for other pleas (Feb 89. 90.) Stor (1816) The rule is established in conformity to the rule in the Sup^r. Court. i.e. by the 2^d opening of the court on 2^d day of the term.

If one writ of error abates or is discontinued by the fault of the plaintiff

in error, a second writ brought on the same judgment is no "superseas". This is necessary to prevent plff from suspending it indefinitely. and if plff in error is nonsuited he shall not have a second writ (SalR 263. 2 Bac 209. Kelt 688. 5 Ray 97.

number
19. 138.

But when the writ abates by the act of God, as the death of plff, or an inevitable accident, he may obtain a second writ on the same judgment. For in such case the abating of the first, is not the fault of plff in error. To the death of the chief justice in Eng^d (1 Kelt 688. 686. 687. 208. Moore 401.) may (1 Com 244.) abate the writ. Reason is, the writ is a commission to the chief justice. —

A writ of Error is not Amendable, except for the purpose of conforming to the record; now was even this allowed until 5 Geo 1st, as they were not included in the great statute of amendments; their object being to affirm judgments & not to destroy them (5 Mod 569. SalR 49. Carth 520. 2 Bac 202. 9.)

In Eng^d a writ of Error does not abate by the death of the deft in error, but a "Sci. fa." issues to summon in his personal representatives to appear & defend: but if plff in error dies, the writ does abate according to the Eng^d rule. This distinction arises from the construction put upon the Stat 1485 Ann, which provides that the writ shall not abate by the death of one of the parties. (1 Vent 34. 2 Bac 209. 9. SalR 264. 687. 208. Carth 293.)

In Conn however, the writ may be kept alive on the death of either party and method is the same as in the case of an original suit. —

In Eng^d and in Conn. a writ of Error is not regarded as a matter of right, & demandable of course in all cases — and in Eng^d it is to be allowed by the C^r of Error before it is operative at all. This rule is established to prevent a party from having such writ without good cause — and in Conn the Judge is applied to, to examine the record, and if he thinks there is no probable ground of error, he will not sign it (2 Wm 277).

Error is not in general predicable of proceedings which are entirely discretionary, as of the proceedings on a petition for a new trial in Conn. no more than in Eng^d, or on a motion for a new trial. — But if a new trial be granted, when from the nature of the case, no new trial should have been granted, it is error: thus if in an action for felony or treason, a new trial should be granted to the prosecutor at Com.

Law - for him a writ of error wd undoubtedly lie from the decision (ante) or if granted by a court not having power to grant one; as by a Justice of the peace, error wd doubtless be predicable (Kilby 41.)

Debt on judgment, may be sustained notwithstanding a writ of error on the judgment - for tho the execution is suspended, yet the debt or duty still remains, i.e. the obligation to pay is in full force, until the judgment creating the obligation is reversed by due course of Law c 7 T. R 458. 3 W 340. 1 Roll 472 c 35. 2 Bac 211. 2 Roll 290. Dyer 32. pl 35. 1 Sid 236. 1 Lev 253. Ray 100. 3 Co 143 a. t. Com. R. 177. 8. Skin 328. Post 176.)

But in some cases the court will stay proceedings in the action of debt till a decision is had on the writ of error. It is matter of discretion with the court to do it or not (2 T. R 78.)

But if a third person obligates himself to pay what shall be recovered in a suit vs A & B. he is not snable on the obligation, pendina a writ of error (2 H. Bl 512.) as if a recovery is had vs A. & B. & a writ of error brought by him, such third person may plead the pendency of a writ of error in bar of a suit vs himself on the obligation: for pending the writ of error, the suit vs A. & B. is not determined.

When an execution is completely executed, as by taking debts body, and imprisoning him, the writ of error is not superseades (4 Bac 670. Post 237.) i.e. it will not discharge him from prison.

So if property has been taken on execution & sold, a sub^t writ of error does not annul the proceedings (1 Vent 30. 4 Bac 684.)

But if the goods are merely taken on execution & ^{not} sold, a sub^t writ of error does ~~not~~ annul the proceedings (2 Roll 496. 2 Bac 210. n. 310. 14th 684.) but this opinion seems not to be Law. The true rule is, that after goods are once seized by the Sheriff, there can be no superseade; an execution once begun must be concluded. The point has been decided in cases, & is supported by the greatest weight of Eng^h authorities (4 Bac 684. 4 Geo 6. 1 Vent 255. Salk 114 b. 7. 323. 2d Ray 990. Cro. El 597. 2 Bay 370. Post 563. 376.)

According to the comm. practice an erroneous judgment is as to the orig bail a final judgment: i.e. the bail in the original action are not subjected, unless it be in the orig one, even tho the judgment shd be reversed by a writ of error: This is by stat. 1 Rost 587. 2 Stat 105. 6. and is directly the reverse of the Eng. rule (1 Bac 212. Co. 2. 745. 10. 119. 526. 134

If plff in error does not assign errors, judgment is not affirmed in error, because there is no proceeding on it: the original judgment remains unaffected; therefore deft does not recover his costs on writ of error, but must resort to the bail in error for them (2 Bac 216. Sid 296. 2 Keble 250. C Errors are assigned after the "sci. fac. ad audiend. errores". -

The last rule is not applicable to comm. practice - the errors must be assigned in the writ itself. In Eng^d they are not assignable until service of the sci. fa. & upon the deft in error. -

If the plff in error after having assigned error suffers a non suit, there is no judgment of affirmance or reversal; but merely for deft in error to recover his costs. - A reversal of judgment in some cases overreaches the proceeds on the execution under the orig. judgment. e.g. If goods are taken on the ex^{ce} and kept by the officer; or if goods or land be delivered to the creditor at a valuation, & judgment is afterwards reversed, the property is restored to the orig. deft in the ex^{ce}, i.e. plff in error. (2 Bac 281. 2. 370. 1 Roll 788. bel 173. Co. 2. 246. 3. vide 3 Com 177.) the reversal by destroy^g the judgment destroys the title acquired under it.

In some cases however the judgment reversed does not overreach the proceeds under the ex^{ce} - The rule of distinction laid down by Lord Holt is that collateral things executed, are not divested by a reversal of the orig judgment - but that collateral things executory, are so divested (8 Co. 142. a. b.)

Thus if lands or goods have been taken by the Shff & kept by him or delivered to the creditor on appraisal, the property is restored on reversal, for the very ground of the creditors lien is destroyed. The collateral thing is executory. - (1 Roll 778. 2 Bac 281. 2. 370. Co. 2. 246. bel 143. 9.) Du. if creditor had sold them to 3^d person -

But if the property is sold by the Shff on the orig execution to a stranger, he will hold it notwithstanding, the reversal of the judgment: i.e. when the Shff

It is most decided that the orig deft shd & retain them.

is required by law to sell, for the law will not vacate an act authorized & enjoined by itself. -

If the property be lands, the rule is contra in Comm. sed qu. (2 Bac 221.2. Helo 108. 3 CR 143. Cro El 278. Mod 593. Cro Jac 246. 3 Sw 83.) Here however the party may have his remedy in damages to the vend for wh the property was sold (3 CR 143. a. Cro Jac 246.) In the last case the collateral thing (qua. what thing?) i.e. the title is executed & vested by an act of the law in a third person. -

Upon a similar principle if one taken in execⁿ on the orig judgment escaped from the Sheriff, and before a recovery had vs the Sheriff for the escape, the orig judgment is reversed, the act vs the Sheriff is annulled by the reversal of the first judgment - for nul til record may be pleaded to it by the Sheriff. on reversal it ceases to be a record. -

But if a judgment & execⁿ had been obtained vs the Sheriff, in the action for the escape before the orig judgment was reversed, a subsequent reversal will not annul the judgment obtained vs the Sheriff. That will remain good, notwithstanding the writ of error & reversal (3 Co 142. 1 Saund 38.) - for here the collateral thing, is executed, i.e. the action vs the Sheriff is good, & finished. In this case "nul til record" could not be pleaded to the first judgment, the reversal of it being subject to the recovery vs the Sheriff. But in the last case the Sheriff might be relieved by a writ of ^{8 J. 142.} "audita querela" (Cro Jac 646. 2 Bac 224.2.)

But suppose property taken on execⁿ and delivered according to law into the hands of the party prevailing in the orig suit, on appraisement: after wh. the orig judgment is reversed: Is the property in such case to be restored to the plaintiff in error by the purchaser? The books are not explicit on this question (3 Co. 143. b. Cro Jac 278. Helo 178. q. 108.) It must be: for in all cases the purchaser must look to the title of the vendor and abide by it; wh he can ascertain by examining the record; and if he does not it is his own fault: & besides in this case, the law does not require a sale (3 CR 143. b. Cro Jac 278. Helo 108. q.) The purchaser's remedy is on the grantor's covenant or warranty

of title (express or implied) if any. If not & no fraud is practiced on him in the sale, he must bear the loss. 133

And if Sheriff should sell property taken on execution to a stranger, when he is not bound by law to do it, the title of the purchaser is divested by a reversal & he must restore it (1 Bac 232.) ex. case of the goods of an outlaw taken on a "capias ut legatum", when Sheriff is not required to sell, but to keep them for the King. Here the sale creates no title - it not being warranted by law. (1 Roll 778. 5 Co 90. Ro. El 278. 3 Bac 778.)

In Error a writ of error is barred by a lapse of 20 yrs from the entering of the original judgment on record. In Error by that law it must be brought within three years, & by a stat of the U.S. within ten years after judgment obtained. (2 Bac 200. 5 Corn. 290. Sta 837. That 10. 11 Wm 3^d)

When judgment is given for debt in error, he recovers the cost accruing on the writ of error. If for plaintiff in error, no costs are taxed on the suit in error, for costs are considered as special. - But if in this case, the judgment in error puts an end to the controversy, as it will not generally, if debt below is plaintiff in error & prevails he recovers costs on the original suit, i.e. costs under the name of damages incurred in the court below. - But if the reversal does not put an end to the controversy, as it will not generally if plaintiff below is plaintiff in error and prevails, the original cause may be entered for a new trial in the court above reversing the original judgment. or remanded to the court below for the purpose, as the case may be. i.e. it may be entered in the court above, if that court can try the issue; if not it must be remanded to the court below, & in either case the costs must follow the final event of the suit. Suppose a judgment to be reversed for the admission or non-admission of a witness, now this reversal evidently does not decide the rights or merits of the cause, but must be entered for further trial, & according to common practice, the costs follow the final result of the trial. If he finally prevails he will in common recover all his costs except on writ of error. If he does not proceed to further trial by entering he is not entitled to costs. (1 Corn. Rep 100.)

In some cases plff in error does & in others does not recover any thing besides a mere reversal & costs accruing in the Court below. If plff in error has paid any thing on the erroneous judgment, or if his property has been taken to satisfy the judgment, he may recover under the name of damages on reversal, the amt he has paid, or that has been taken to satisfy the orig judgment. But if his property has not been taken, and he has not paid any thing, he merely obtains a reversal together with costs of the suit below.

But in reversal plff in error recovers as damages the costs wh. he ought to have recovered below - unless he has a further trial, or as now decided, has a right to pursue the writ further (1 Com. R. 150.) If he has, or if the controversy is not ended, the whole of his costs must await final judgment. If he has a right to prosecute further & does not, he loses all costs & recovers only what he has been compelled to pay on the erroneous judgment. (ib.) -

When upon a writ of error, judgment is affirmed, the deft in error is regularly entitled to interest on the orig judgment, as a recompense for the delay occasioned by the writ of error. The allowance of interest in such cases in Eng^d is discretionary with the Ct in com. cases. In Conn they have a stat^e allowing interest in such cases to be assessed at the discretion of the Court; but this discretion is never exercised: in all such cases deft in error receives int^r as a matter of course. (2 H. Bl 184. 1 Bos. & P. 289.)

But interest is never allowed in Eng^d in debt or recognisances the bail in error for the orig judgment. No neglect or delay is imputable to the bail - it did not become their duty to pay until affirmation & failure to pay on the part of plff in error. (2 L. R 57. 78. Doug 723.)

If the orig plff reverses a judgment below wh. was vs himself, & in a case where he has a right to prosecute further & does not, he waives all his costs, for his not pursuing his claim is evideⁿ that it is a weak one. 24. If plff's declaration is adjudged insuff^t. on dem^r & he brings a writ of error & reverses it; now if he does not proceed in the new action, he loses his costs, and if he does, the whole costs follow the final verdict.

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Upon a judgment of affirmance in error, the prevailing party is entitled to interest upon the right judgment, at the discretion of the court: for the writ has suspended the judgment & delayed the execution. The Stat. however leave it discretionary with the court. -

Cases exemplifying the effect of an affirmance or reversal of judgment on a writ of error. -

Court below?

A vs B. S.

Case I. Judgment below for A to recover of B. \$20. debt & \$10 costs. Judgment reversed for the insufficiency of the debt before A had collected any part of his execution. Judgment above is, that judgment below be reversed & that B recover of A \$10. the amount of the costs incurred by B. in the court below. But no costs are recovered by B. on the suit in error, because he brings it. -

Case II. The case as before except that A had collected the contents of his execution viz. \$20 debt & \$10 costs. Judgment of reversal as before, & that B recover of A \$40. viz. \$20 paid to A on the erroneous judgment & \$10 costs wh. B ought to have paid recovered in the court below. In both these cases the judgment is final. -

Case III. Judgment below in favor of A, affirmed in the court above: here the judgment of the ct above is that the judgment below be affirmed, & that A the debt in error recover his costs on the suit in error. The judgment below is again operative. Interest on the first judgment is also allowed, if the ct in their discretion think proper & execution issue for it (Stat Cor 102.) The practice is, I believe, to allow it of course. -

Case IV. Judgment below in favor of B. the debt below. A by writ of error reverses that judgment. The judgment in this case is merely a judgment of reversal, if ct above is competent to try questions of fact (as B. R. in Eng^l & Supr. Court in Conn.) A on reversal, enters the cause in the court above for further trial, & on final judgment, if he prevail, recovers with his debt & damages, all his costs wh. accrued as well before reversal, as

more wh. accrued afterwards. But he recovers no costs on the suit in error. If A had paid the costs taxed w^h him on the judgment below, he w^d have recovered that on the judgment in error as damages. But A must enter the action if at all, on the same term in wh. the judgment a reversal is rendered. (1 Roll. 13)

Case V.

Case VI. Demurrer in the court below to the declⁿ; declⁿ adjudged good; on writ of error judgment is reversed. Here it w^d gently be absurd for A to enter, since his declⁿ is adjudged insuff^t & that deft below never wishes to enter for trial. Still plffs may enter, so that if his declⁿ can be helped by amendment, he may have an opportunity to do it. -

Case VII. Declⁿ in the court below adjudged insuff^t - reversed on writ of error. Here A enters for trial, if the Ct above can try questions of fact; for he has a good declaration - the merits have not been tried; since the Ct above have rendered only a judgment of reversal, & not a judgment "quod recuperavit" & the court above cannot on the judgment of reversal ascertain the damages. -

VIII Case. Plea in bar demurred to below & adjudged suff^t; judgment reversed in Ct above. A enters for Trial; for as yet there is no judgment for A to recover in the face of the record, for aught that appears, he has a right of recovery. -

IX. Case. Plea in bar adjudged insuff^t below. Judgment reversed in the Ct above: if A sh^d enter it w^d be to no purpose & B does not wish to enter, for his object is only to defend, & that object is obtained by the reversal. -

X. Case. Plea in abatement. Judgment below that the writ abate. Judgment reversed above; plff enters for trial - for he has a good writ

and a right to prosecute to final judgment.

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XI Case. Plea in Abat. as in the last case. Judgment "respond. oster" in the Ct below - reversed in error - A cannot enter, for he has no writ.

May he not enter, if his writ can be amended as in Case VI?

XII. If error is brought for the admission or rejection of ~~vide~~ ^{vide} ~~plff~~ ^{plff} below - may enter for trial on reversal of judgment, whether he be ~~plff~~ ^{plff} or ~~def~~ ^{def} in error; & whether the judgment is for or ~~vs~~ ^{vs} him. Ex. a witness was excluded below: on a bill of exceptions the judgment is reversed. A enters for trial. Here he is ~~plff~~ ^{plff} in error & the judgment in error is in his own favor. B's witness was excluded below, judgment reversed: Here B. is ~~plff~~ ^{plff} in error, & judgment of reversed is in his favor. Yet A may enter for trial if he pleases; for he may possibly prevail, notwithstanding the admission of B's witness.

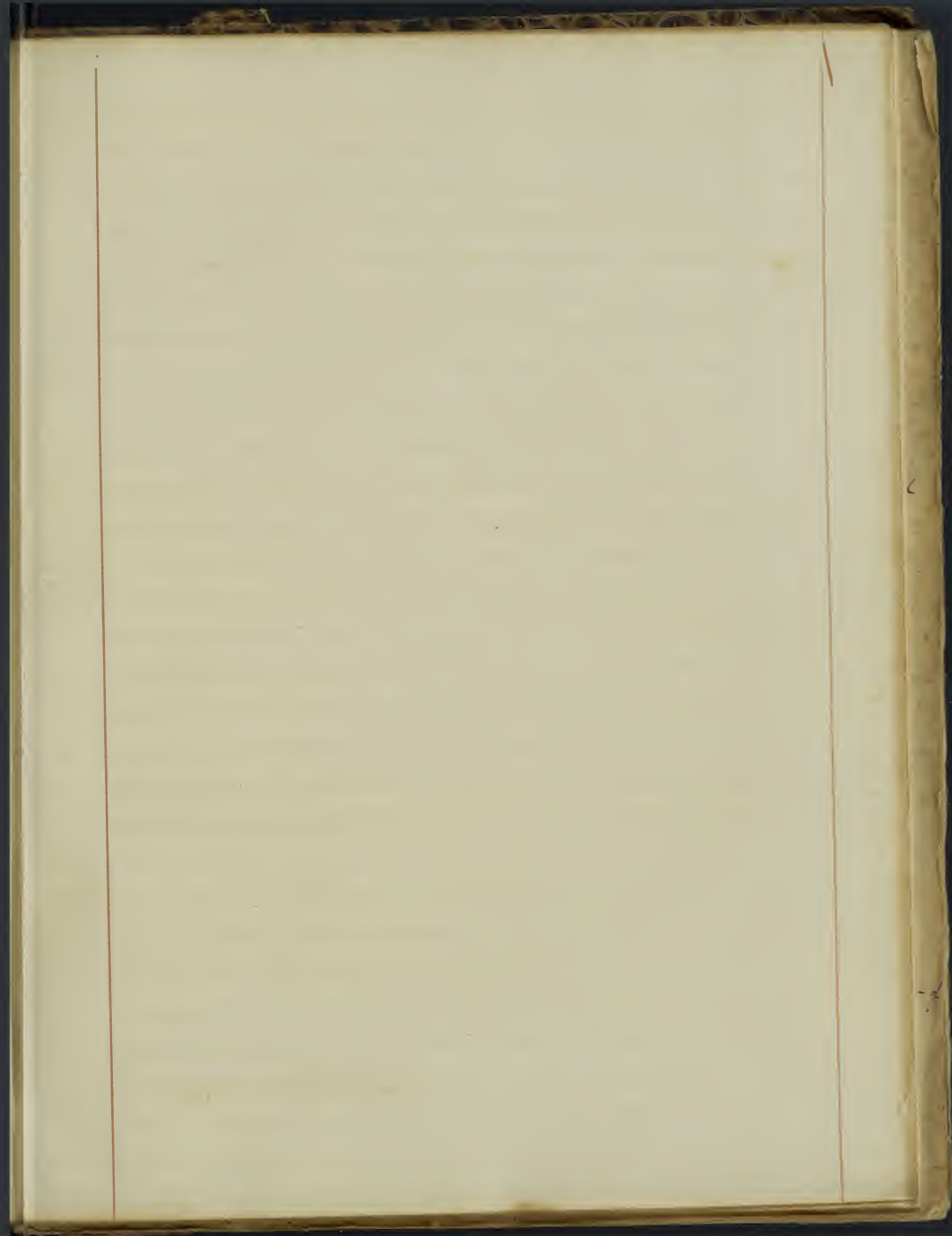
Note. In all these cases in wh. the origl ~~plff~~ ^{plff} is supposed to enter for trial on a reversal of judgment, the Ct above is supposed competent to try questions of fact. If it be not the case, the question is remanded to the court below, & then the final judgment is had. (vide IV. & V cases ante.)

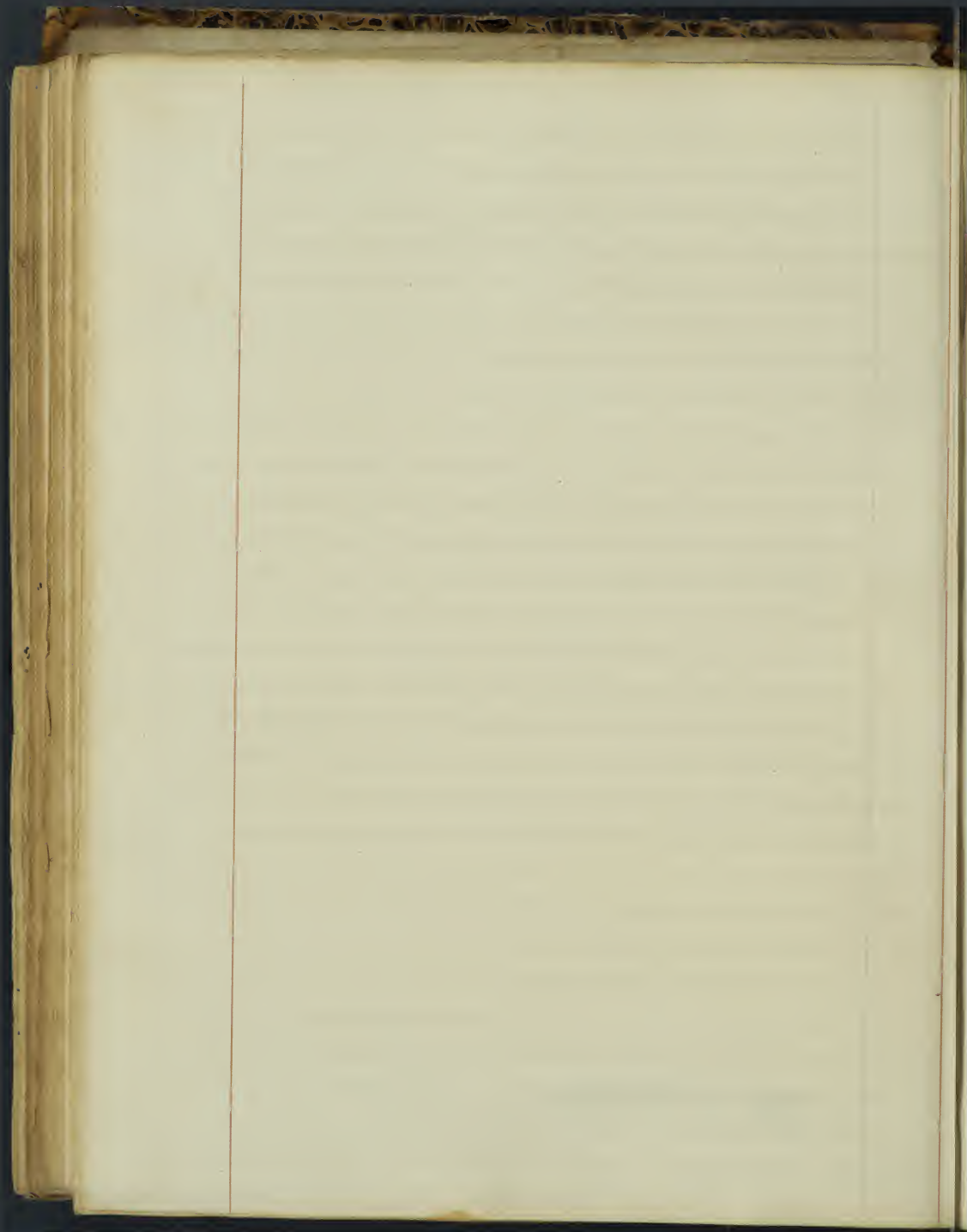
When the judgment in error puts an end to litigation between the parties, the action is never entered in the Ct above, nor remanded for trial. The litigation is always ended, when the judgment is affirmed. But in many cases it is otherwise on a reversal of judgment. -

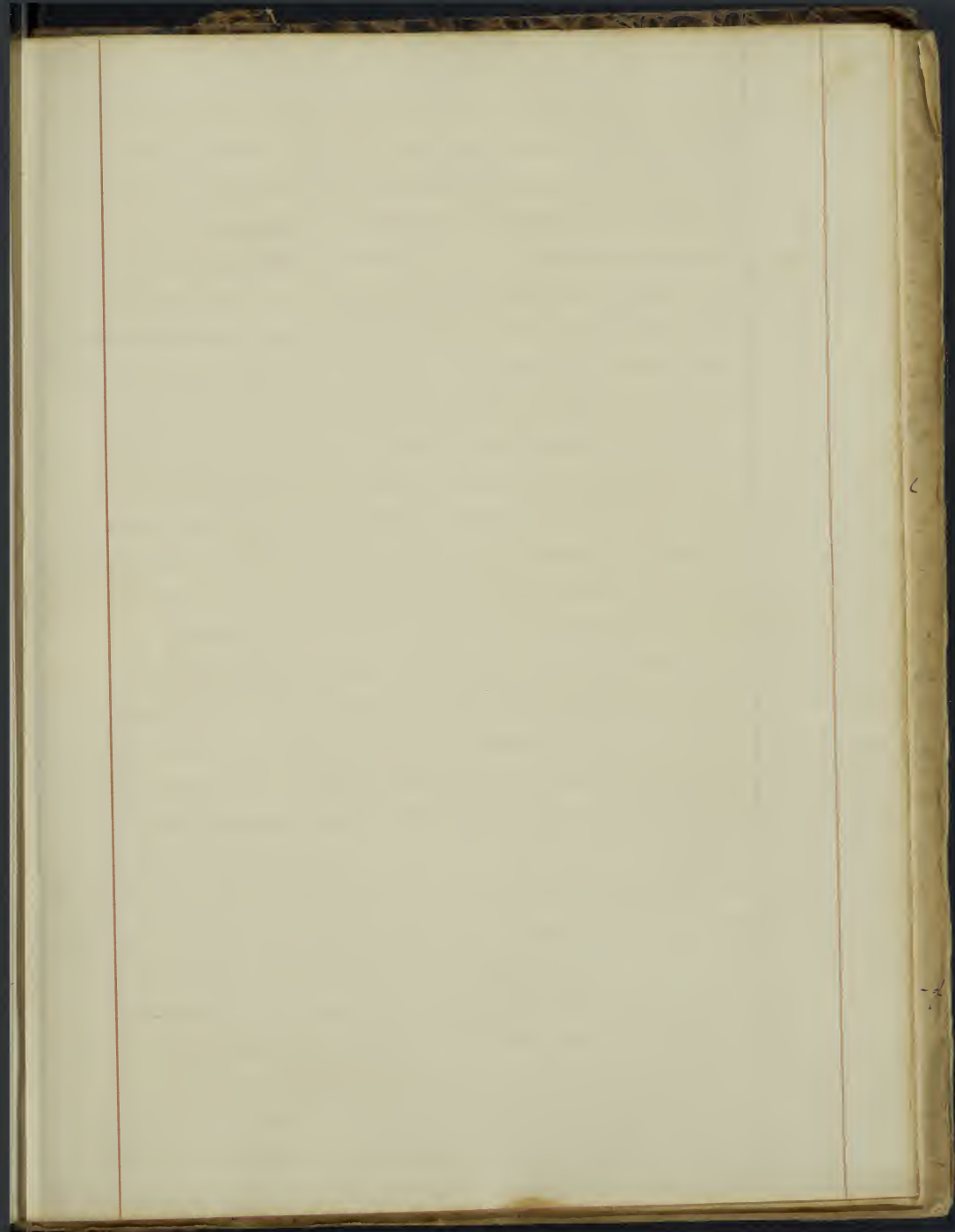
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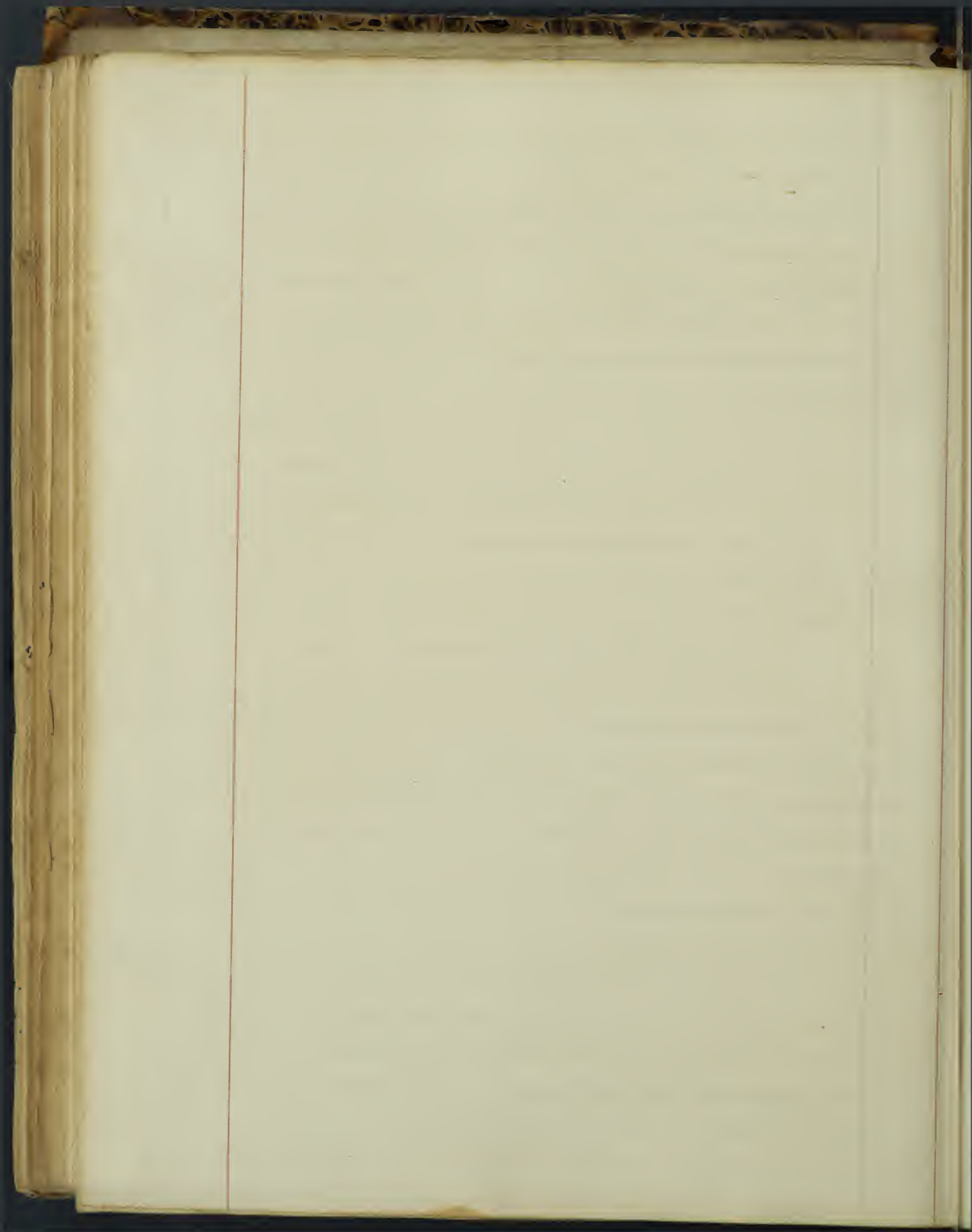
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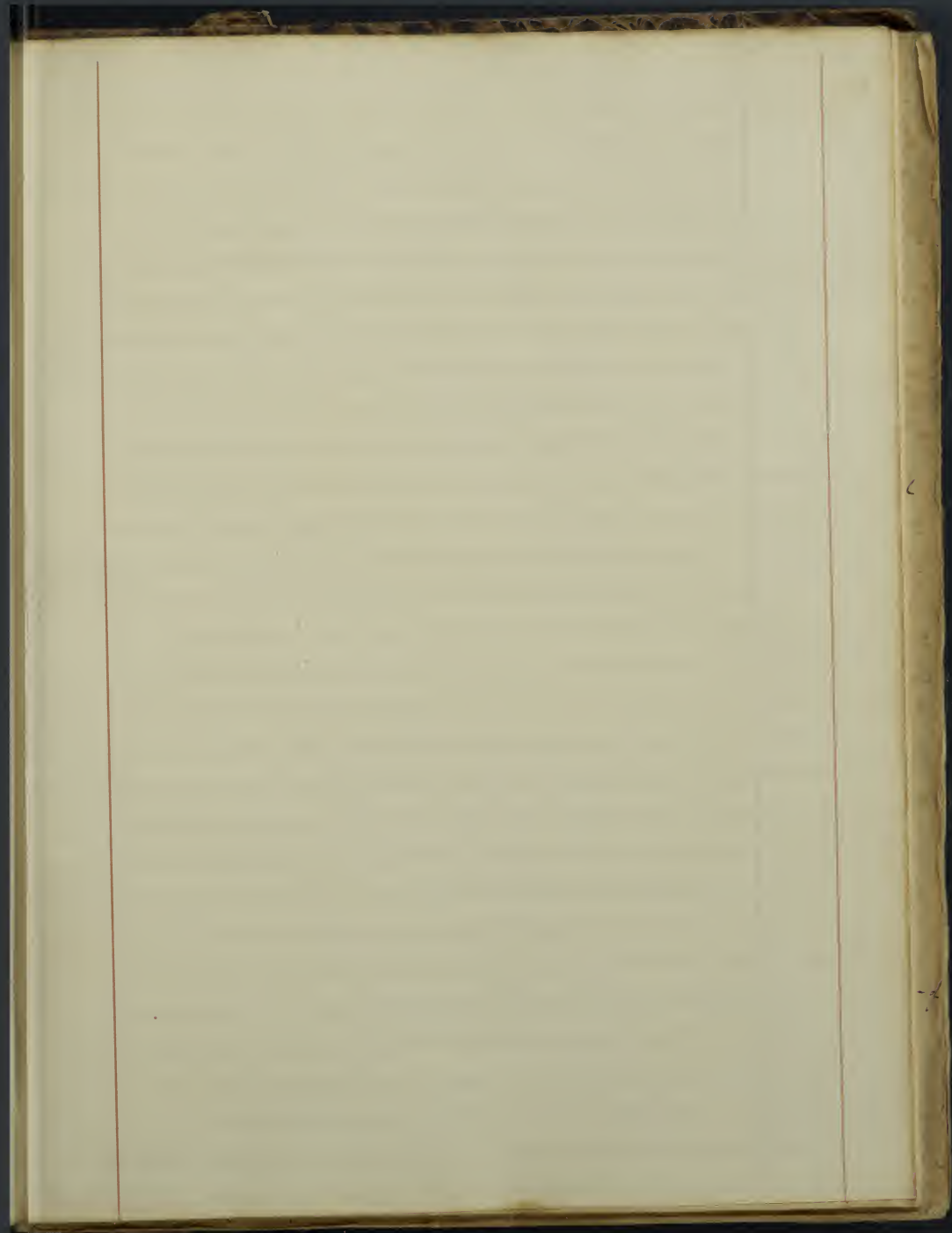
Bill of Exchequer

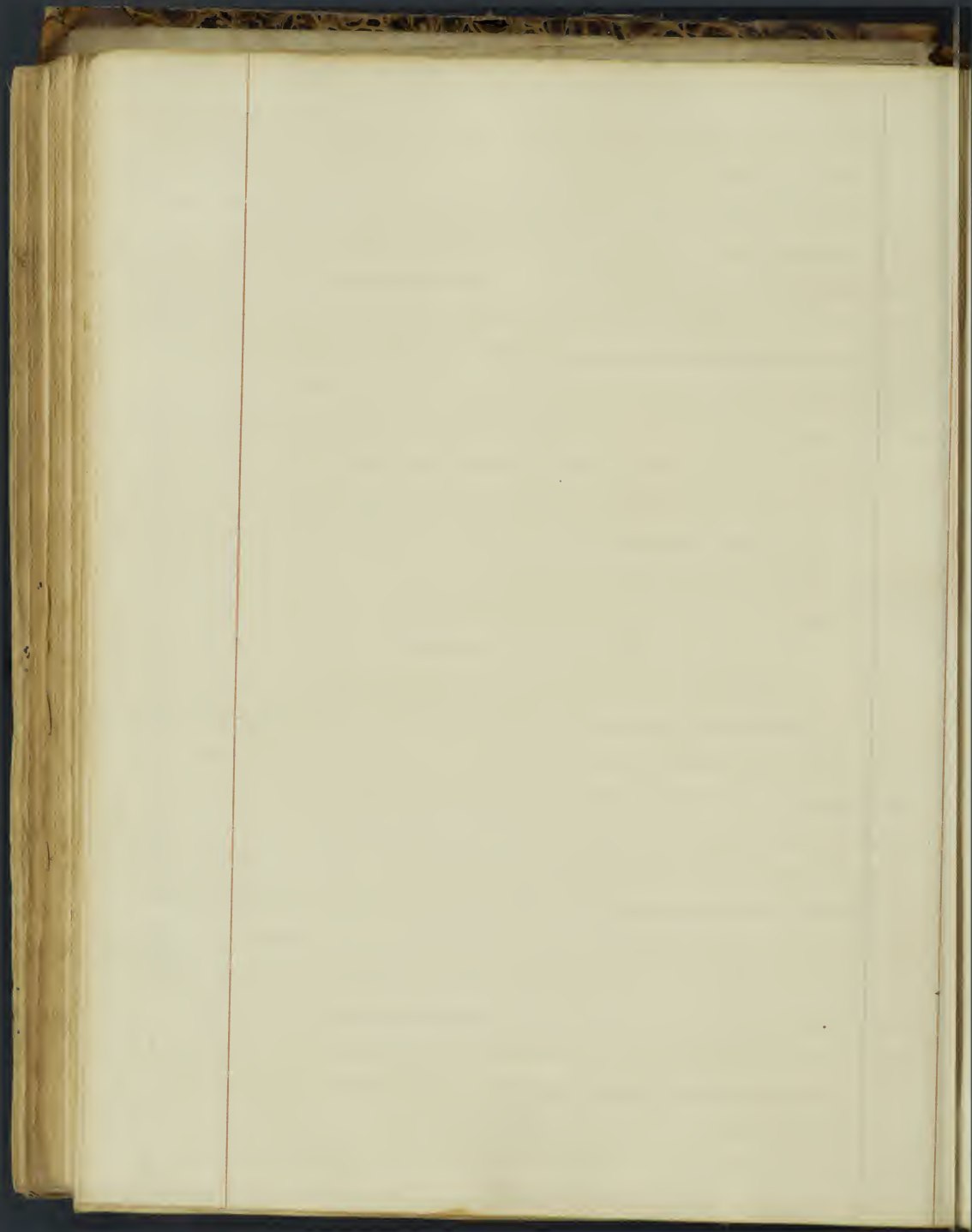


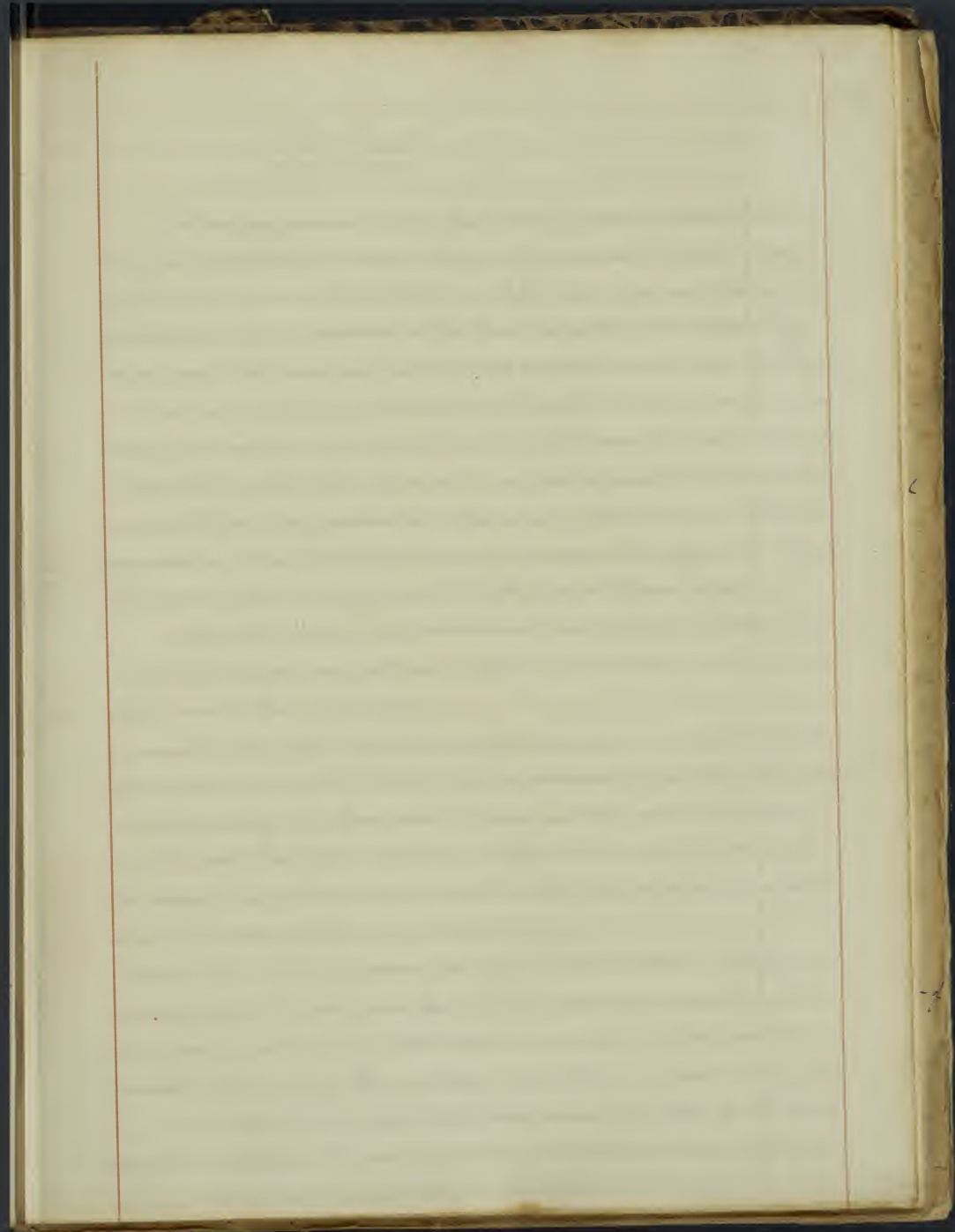


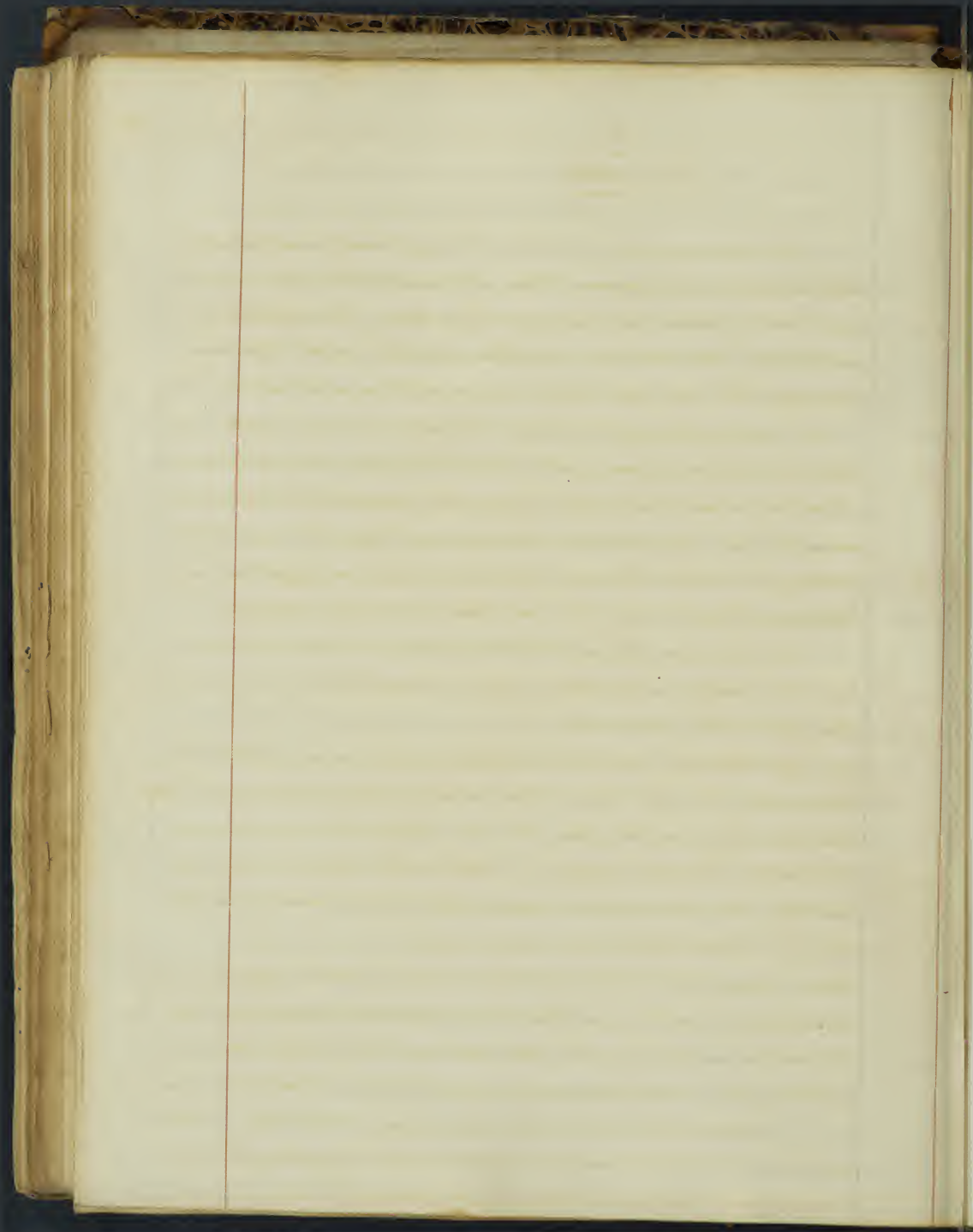












New Trials.

It has been provided by stat that the Sup. & county courts shall & may, as occasion shall require, & they judge reasonable & proper, grant new Trials of causes that shall come before them, for mispleading, or for discovery of new evidence, or for other reasonable cause appearing, according to the common & usual rules & method in such cases. (2 Sw. 270.)

The mode of obtaining it in Eng^d is by motion made in Bank. in the courts of Westm^r for instance, and not at St. P. where the first trial was.

Granting a rule to shew cause on the motion, suspends the judgment, & prevents it from being entered up, & the reasons of the motion are afterwards discussed in Bank. - It may be granted at any time before the judgment but never afterwards. (Dow 770.) Genl^y after verdict & before judgment.

When this country was first colonized, new trials were not known in Eng^d - the remedy was by attain^r - so that our courts having no law to direct them, made their own rules.

An application for a new trial is in genl considered as an application to the discretion of the court. Therefore these are not usually granted, when substantial justice has been done, tho' some mistake may have intervened. (2 Wils 358. Bull 326. 3 East 457.) Aliter where a point is saved by the judge. In such case the Ct considers itself in the relation of a judge at St P. (1 Bos & P. 338. a 38. q. 1 Bos & P. 399.)

Hence when verdict is found for deft, on what is called a hard case, as on a prosecⁿ on the game laws, wh. are considered odious, the Ct will not grant a new trial, even tho' there were an error as to the admission or rejection of ev^d, or any other mistake (vide 1 T. R. 469.) where Lord Kenyon

a presumption raised by the jury contrary to ev^d: In wh case no new trial is granted, if the verdict is according to Eq^y & conscience (3 Bl 391. 2. 2 Mod 118. 646. 1 Burr 394. q. 2 T. R. 45. 1 B. & P. 388. 4 T. R. 469.)

This rule does not apply in all cases (post) hence not granted to deft., to let in defence of usury, infamy, coverture, & St. Lin.^{or} or any unconscionable defence in Genl. (1 B. & P. 52. 454. B. R. 85. Sta 1242.) as to St. Lin.^{or}. See & vide 1 B. & P. 228. 3 T. R. 124.)

On the same principle the court can impose such terms as they please upon the party in whose favour it is granted. Admission of facts, production of Books papers &c. in Eng^d examination of witnesses in form &c (3 B. & P. 392. T. R. 646.)

So discovery of certain facts under oath (7. T. R. 529.)

2 Lev 160. In Eng^d if the ground of application is any thing wh. passed in chat the trial, the information on wh. the st. acts is taken from the judges report at N. P. If it did not appear at the trial it is declared at the trial (3 B. & P. 391. 158235.)

Error is not predicable of the decision of courts in granting or refusing new trials, it being discretionary (Kirby 41. 2 Bay 362.) See sup- pose it granted in a case in wh. it is not under any circumstances granted? 24. as one tried for felony? auth. differ. ante. & post.)

These were not known in the ancient practice of the Eng^d Cts. the only remedy for a false or unjust verdict, being by attainder. B. R. traces them to the reign of Edw. 3^d, & others to the time of Cromwell. Indeed they had not become usual & settled until after the restoration (3 T. R. 131. Sta 101. 3 B. & P. 387. 31. 1 Burr 394. Silw 648. 5 Bac 240. Sta 662. 995. 1. 213.)

The causes in Edw. 3^d were misbehaviour - in Cromwell's time excess & damage as affording a presumption of misbehaviour. But since those times they have been granted for various other causes; and have contributed much to a just administration of justice (1 Burr 945.)

In Eng^d they have of late years been granted where grantable at all, as well after trials at bar as at N. P. and for the same reason, an improvement, tho' formerly this wd have been improper. as in such an event the case wd have been rejudged by the same Ct. But judges sometimes give a premeditated opinion wh. they are willing to retract (1 Bac 395. Sta 585. 1105. 5 Bac 243. 1d Ray 1358.)

It was formerly holden that no new trial could be granted in these cases unless 139.
for misbehaviour of jury 15 Bac 248. 1 Sid 58. Salk 664. 7 Mod 37. 3

And the great maxim now is, that in all cases of sufft in substance a new trial
may & ought to be granted, if it can be made to appear that injustice has
been done at the first trial 15 Bac 246. 3 Bl 388. 9. 2 Bur 395. 203. 9. 665. 209. 3.
6 T. R 788. 11 Mod 202. 3 It is not "stricti juris". -

Genl. Rule. That motion for a new trial can't be made in En & after
motion for arrest of judgment; for by it, the verdict is admitted to be good.
Salk 647. 3 but not E. converso. -

Exception. When the case of new trial was unknown at the time of moving
in arrest 15 Bac 261. "Trials" L. 1. Bull 225. 6. 3 Bull not universal. In the
season of it? If judgment should be arrested, new trial wd be useless (Salk 647. 3)

It has been holden that where there are several depts and all convicted, or
part convicted & part acquitted, no new trial can be granted as to one or
part of them: for the verdict it is said must stand or fall in toto. (ante)
Bull 326. Salk 362. 12 Mod 270. 3 Keble 609. Stra 214. 3

This seems now to be overruled in Eng^d, and a new trial may be granted
for one or a part of them only: and the case wd be a very hard one, if an
innocent man sh^d have a new trial, merely because another was join-
ed with him. (6 T. R 638. 619. 3)

In cases of this kind when a new trial is granted to one of several depts,
when the record goes down for a second trial, the one convicted for the 1st
& he only is to be tried - for the other having been once acquitted cannot
be tried again -

Causes for granting the I. Want of due notice to depts, of Trial. 15 Bac
241. trial L. 1 Salk 664. 435. Bull 327. 3 In the case of want of notice & non-
appearance of depts, the Ct I presume are not left to their discretion, so far
as to refuse a new trial, because justice has been done - for there has been
no trial, and depts has an unqualified right to be heard. Quere. Consent
of parties can remove all objections to judgment except those wh. relate to

140 subject-matter. -

II.^d For defect, a mistake in the judge before whom &c. &c. of defect, when the judge is interested (5 Bac 244. 11 Mod 119.) Of mistake, in admitting ¹⁰²improper evidence or excluding that wh. is proper (vid. 5 Bac 244. trial L. 3. 6 Mod 5. 242. ¹⁰¹102. ¹⁰³104. 76 53.) So of a misdirection of the judge in point of law (Bull 327. 4 T.R. 753.) any mistake wh. might have influenced the verdict. -

In some cases new trials have been granted in Bank for misdirection and admission of improper evidence by the whole Court on a trial at Bar. not common however. (1 Burr 395. 585. 1168. ante.) 2 S.R. 5

The grounds for granting new trials in England at bar, are great value, probable length & difficulty in the trial. No new trial for misdirection in law if justice is done (2 T.R. 5.) Tho' the improper admission of evidence is good ground for New Trial: but the incompetency of a witness not objected to at the time of the trial (tho' it be not known) is not substantial ground for a new trial: it may have its weight among other things. (1 T.R. 717.)

If upon an objection made to an inadmissible witness, he is admitted by the court, or proper evidence is rejected, in either case the suffering party may maintain a motion for a new trial. (Pac. ch. 194. 1 Burr. 394. 5.) It is said that if the cause had been lost by the testimony of a person legally infamous, a new trial will be granted in England (1 Burr 394. 579 settled to the contrary at com. law (See 2653. 12 Mod 584. 1 T.R. 717. 1 Bos & P. 430. n.) But the last cases proceeded on the ground of neglect. - The infamy of the witness was known at the trial, but the record was not adduced (1 T.R. 717. &c.) But the cases contemplated by the rule must be those in wh. the objection was not taken, or infamy not proved at the trial. -

If the facts were not known at the trial a new one ¹⁰⁴and perhaps be granted. sed. qu. for it has been determined in England that the incompetency of a witness arising from his ¹⁰⁵discovered after the trial is not of itself a sufficient ground of granting a new trial (1 T.R. 717. Peck. 187.

Improper rejection of witnesses is not a sufficient ground for a

a new trial if the fact he was called on to prove was established by the ev^d or not
denied, and defence proceeding on a collateral point (3 East 456.) 141

As to the character of the witness produced, of this he must take his chance;
formally it was held that witness might be interrogated as to the fact of his
conviction. But it now is that it must be proved by rec^d. - If rec^d of his
conviction had been produced at the trial the judge wd not have admitted
his testimony; but as this was not done, the party guilty of neglect ought to
suffer for it. -

III.^d. For defects or incompetency of the jury, or any one of them in cer-
tain cases. 2s. if a juror might have been challenged as incompetent,
but the fact was unknown at the time of the trial by the party or whom he
c^d Bae 264. 7 Mod 54. 1 Turk 30. Sta. or St 129. 7 Lu. unless cause of
challenge goes to the impartiality. Case in Turk 36. New Trial was refused
on the ground of laches - Does not appear but that deft knew of the
cause of challenge at the trial. In Sta. 129. cause must have been known. -

IV. Misconduct of the jury; as corrupt practices, partiality, inattention &c.
if they refer the decision to chance c^d Bae 250. 99. 91. Bomb 57. 2 Sw 140. 3 Bae
trial L. 4. Verdict 8. 7 So for misconduct of one juror; as when the fore-
man had declared that Jeffs shd never have a verdict whatever wd he
advanced c^d Bae 250. Trial L. 4. TalR 645. 7

So if jury are not unanimous - In very early times perfect unanim-
ity was not necessary in the jury; but for a long time past it has been c^d
Bae 278. 3 TalR. 375. 6. 7 In Eng^d if they do not agree during the
session, they are to be carted round the country, till the end of the same
term; and the judge will not receive the paper till they do agree (c^d Bae 287.)
This has been done by the U. S. Circuit Court. -

But both in Eng^d and Amer. if the jury are not ultimately unan-
imous in their verdict, it is in strictness bad, & must be set aside c^d Bae
296. Comb 14. Kibb 141. 416. 2 Sw 253. Bae trial L. 4. Verdict 8.

An expedient has been resorted to, to evade the rigour of the rule

1462 and this is by permitting the minority to come in ~~et cetera~~. i.e. without directly objecting or dissenting, and the dissenters are not afterwards permitted to testify their dissent.

This behavior of the jury. In Eng^l after the jury are locked up, it is misbehavior in them to eat or drink without liberty from the Ct, till they have agreed on a verdict (5 Bac 290. Verdict H. 3 Bl 375) and returned it to the Judge (Moore 33. 1 Vent 125.)

But the verdict is good notwithstanding their eating (unless it is at the expense of the favored party) tho they are liable to be fined. (Co Litt 227. Dy 218. 12 Mod 211. Loe 132. Id Rayd. 148.) If the jurors eat or drink at the expense of one of the favored parties, before the verdict is agreed on & returned, & they find a verdict in his favor, it is bad, and there must be a new trial. (5 Bac 290. Verd H. 1 Vent 125. Co Litt 227. 12 Mod 111.)

Privy Verdicts. For the purpose of relieving the jury from the hardship of confinement and abstinence, till the verdict is delivered into Ct, privy verdicts have been devised in Eng^l i.e. verdicts written, sealed, & delivered to the Judge out of Court. - But a privy verdict is not binding upon a jury: they may vary from it in the verdict given in open Court (5 Bac 282. Co Litt 227. Verdict B. 3 Bl 377.)

So that a privy verdict in effect only amounts to this: that the jury's eating or drinking after it, at the expense of one of the parties, does not vitiate the verdict, unless they change it in favor of the party treating them (1 Vent 125.) O tempora! &c. - For in this case there is strong presumption of fraud. If they do thus change it it will be set aside. -

Privy verdicts cannot be given in case of felony; nor in any case of life & death or member: nor where personal appearance of death is necessary to his conviction (5 Bac 283. Rayd 193. Vent 97. Co Litt 227.) for the jurors in such cases must look upon the prisoner, when they deliver the verdict. -

Receiving Bot out of Court. - It is said in Vaughⁿ 147. that the jury have a right to find their verdict, partly on their own personal knowledge. This does not seem to be law (1 Sid 133. 3 Bl 374. 5. 5 Bac 239. Verd. H.)

It is a rule (idem) that no juror has a right to communicate his knowl-

edge to his fellows after they have retired: if he does the verdict must be set aside. 143.
He sh^d tell it in open Ct. (1 McSt 238.) Aliter the verdict is bad: for each party
has a right to cross examine. So it also seems to be inferable from Granting a
new Trial because the verdict is contrary to ev^d. - Besides, he is not under o^rth.
The jury have no right to reexamine a witness in private, after retiring.
Cao. El 189. 44. 5 Bac 238. ver^d H. J verdict is bad & new trial grantable. -

15 d 255: If the jury take with them any written ev^d not exhibited at the trial
the verdict is bad, & it is a cause for a new Trial C 5 Bac 239. ver^d H. 2 H. Bl 413.

On arg^t the jury cannot take with them any written ev^d, tho exhibited at the
trial, without the consent of the parties, or leave of the Court: if they do, it is a high
misdeemeanor (60 Litt 227.) ⁺ & in most of the U. S. d. C. think^s. -

But if the writing furnished ev^d on both sides, the verdict is good - aliter ev^d.
C 5 Bac 238. 2 Roll 714. Id Ray 148. Cao. El 44. J This distinction is a vague
one: latter rule not so strong as that relating to parol ev^d: & rec^d by the jury:
for parol ev^d may vary. (12 Mod 200)

But tho a Juror's misconduct vitiate a verdict, yet they are not per-
mitted to testify to the fact. The ev^d of it must be derived "aliunde". (Olin
contra sensu. C 5 Bac 288. Cao. El 189. 15. R. 11. Barnes 438. 441.)

May not one Juror testify to the misconduct of another? reason why he can-
not testify to his own is probably not only the maxim, that no one need crimi-
nate himself, but also the power it wd give any unprincipled Juror to set aside
any verdict. -

If the foreman delivers a wrong verdict by mistake, it may be set aside, & a
new trial granted: and the jurors are admissible witnesses to prove the fact,
tho perhaps not ⁺compellable to testify to it (1 Burr 385.) J. G. thinks they are. -

The jury's finding a genl verdict, when directed by the Ct to find a special
one is not regarded as misconduct: But in such cases the verdict is of the
opinion of the court, & there may be a new Trial granted. - This finding a
diff^r verdict is only an auxiliary reason, & is not suff^t per se (1 Port. 1213. 5 Bac
207. 7 Mod 37.) The latter case cited seems at first to impugn this rule: but

144 that was a mistrial after a trial at Bar - a new trial was refused. -

the Court where the Jury have misconducted (at supra) mistrials in arrest of judgment are concurrent with new trials. vide pleadg.

V. Finding Verdict or direction. This is not illegal conduct: this direction is genl^y founded on the application of one party or both: - if agt the opinion of the Court a new trial is granted. - (The Jury have a right to find a Verdict wh. the Ct. can't controul.)

VI. Verdict vs Evidence. wh. is a cause of new Trial in Eng. (2 Sta 1106) as well as in this country (1 Conn R 427. 5 Bac 246. 7. 90. comp 37. 3 Bl 372. Bull 326. 7.

This rule has been much objected to, as it is the province of the Jury to determine the credibility & weight of testimony. - But it is to be observed that the Court try every issue of fact as well as of Law, and that the Jury is only the instrument by wh. it is tried questions of fact; as the record is an instrument by wh. it is tried, as a qu. of marriage is tried by certificate, Infancy by inspection &c. -

However the Ct does not decide the question; when they thus grant a new trial they merely take it from one Jury & give it to another; and such power is absolutely indispensable in the Ct: for in cases in wh. verdict is vs weight of ev^d & this manifestly, a new trial will be granted. The Court must either presume corruption, or obstinacy, or ignorance, neither of wh. shd bear the gates of Justice! (Not granted in this case if the scales of Justice merely balance)

But it has been said that in this case, there must be no ev^d in support of the verdict (2 Sta 1142. 1106.) But it is now held that the Court ought to grant a new trial, if in the opinion of the Judge, the verd. is clearly vs weight of ev^d. The matter must be handled delicately, as ev. is the Jury's province. (Bull 317. 5 Bac 247. 74. 1 Burr 322. Barnes 322.)

7. If the Jury have given a verdict on the mis conception of a point of Law, or equity vs Law - a new trial is granted. (1 Sta 425. 2 Bl 346 4. Comb 402. 2 Bl 1078. 2 Will 307. 8. 4 T. R 467. 2 B. Ray 147.) There are not many cases of this kind. (1 John 279. Sta 425.)

No new trial has been granted for this cause when the case was a hard

one, or where justice has been done (2 T.R. 5 Do 428.) as in point of law ~~plff~~ 145
was entitled to nominal damages only, & the verdict is for deft, new trial is not
granted because the cause is too small, & justice has been done (4 Burr 2093.
4 T.R. 758.) These cases may occur when either the facts are agreed upon
or where the ~~re~~ is perfectly clear, & the jury make a wrong conclusion from
them. But if a judge makes a mistake as to the law, the ~~cl~~ feel them-
selves more under an obligation to grant a new trial than where it is
done by a jury. (2 T.R. 5. 5th 425.)

8. Smallness of damages. Is a cause for a new trial: but this ground
it seems is only good in an action on count - from note &c. or for a sum
liquidated, or on a bond or note with 4 en dorant & no note of payment, and the jury
find but half the amt, it is the duty of the ~~cl~~ to grant a new trial. 55 Pac 244.
trial L. 4. 2 Sta Rep. 440. 20. 10 41. 1 Barnes 332. 2 ib 366. 4 T.R. 655. Bull 327

No case of tail, in wh this ground has prevailed, & the genl rule is vs it, altho
Barnes thinks it shd apply (2 vol 384. 5th anch.) L. G. concurs. -

The rule however restricting new trials for smallness of damages, to counts
or some liquidated sum, does not hold when the jury, have made the dam-
ages small this mistake in point of law, as by supposing one of the plffs
grounds of recovery wrong, where it was not. - And where plff had been
deprived of his just damages by an unfairness, as deceiving the jury in the
computation &c. In these cases however, it is not the smallness of the
damages per se wh. occasions the new trial, but the fraud or mistake
producing it. -

9. Excessive damages. - is a good cause for a new trial in case of count
& count claim held contra in the case of Cook 3 Bull 327. Comb 17. Sta 420. 3d 5 Pac
249. Trial L. 4. where it was granted because damages were excessive & the jury
appeared partial. - As the rule now is, vid 1 Burr 609. 3 Burr 1344. 6 Comb 357.
4 T.R. 657. 7th 529. 2 Will. 244. 405. 3th 62. Sta 671. 5 T.R. 257. 1th 277.)

Altho by mistake of the jury in computation ~~be~~ plff has a verdict
for more than is his due, where there is a fixed rate of damages, as in an act =

on note of hand - new trial not granted if jess will release the excess c2 T.R. 113. 23
 dict 213. 1 H. Bl 88. Corp 571. Boyl 90. 2 Wils 262. East 637. post.)

So if mistake is occasioned by plffs mis conduct - Chy 213. note. L. Reeves found
 in the books 100 applications for new trials, for ex^{ce} dam^{ts} & only three granted!

From the current cases, presumption of partiality is much urged by some as the
 grounding criterion, in cases for new trials: said unnecessary; tho' some were of the
 modern authorities hold that way c5 Corn 155. 2 Bl.

Suffering a default is only an admit^{ed} that something is done, unless the act is
 not on a written security; & if in this case, judgment is taken for too much, a
 new trial may be granted - c4 T.R. 202. Chy 190. Ball 278. Sid 496. 3 Wils 155.)

A new trial has never been granted for excess^e dam^{ts} in cases of pain
 Corn: c4 T.R. 69. 5th 257. 5th 119. 1 T.R. 277. Ld Raynor seems to doubt c4 T.R.
 644. b. whether a new trial may not be granted here. L. Buller thinks there may (in
 some cases) & with him L. & concurs. -

New trials on this ground granted in cases of ass^{lt} & Battery (1 T.R. 277. 5th 267.)

3724 18.

How is it for detaching plffs daughter? no case of new trial. 2 T.R. 5. 167.)

In case of slander (verb^{al}) new trial may be granted c5 Bac 250. pl. 90. 2d ed
 200. Sta 642. 2d ed 644. 1 Burr 394. 2 no case I believe, in wh it has been granted
 in slander for excess^e damages only (in Sta 626 the mis conduct of the
 jury was an ingredient) c2 Wils 249. 1 Leo 97.)

In actions on the case, not by a parent, per quod socium" &c for an injury
 done to his child, excessive damages is rarely a ground for a new trial: for here
 the damages are in a great measure presumptive c2 T.R. 167. 3 Wils 10. 18. 100. 18.

In actions relating to property the dam^{ts} are more certain viz. there is a
 degree, a definite standard. But in actions for personal injury, the ground
 being more vague, damages are more presumptive. -

Ld Mansfield says (1 T.R. 277.) that it may be granted in any case whatever,
 and is entirely discretionary with the Ct. In whether granted without any
 standard to measure the damages (1 T.R. 257.) this appears to be the
 true rule. Ld Mans^{field}'s opinion is well supported by modern auth^{or} c5 Corn Trial

2. 45 R 657. 5th 257. 2d 166. 2 Blk R. 427. 1326. The strong language of 20
contested by a great number of authorities cited 5 Com 155. 5 T R 257. 127
Salk 647.

10. Mistake of Counsel, in pleading a wrong plea in Court is cause of new trial.
But I find no rule in Eng^d corresponding to this; rather from what is
found in the books that it is not a cause for granting a new trial. 3 C Bac 257
trial 2. 5. 3 Burr 1335. 1 East 637. 2 T. R 134. 5. 10 Mod 202. 3. 5th den Eng^d any
number of defenses may be pleaded: secus in Court. & this causes the diversity.

It neglect of Counsel a Atty is not a good cause here - the remedy is wth Atty. 5
Bac 257. Trial 2. 5. 6 Mod 22. 222. Salk 645. 3 Mag, 84. 12. 13. 14. Counsel negl. to attend

Is it well granted to enable deft to plead usury, H. l^{im} ^{to}, Infancy, con-
tinue & send not. Secus of Bankruptcy. 1 B. & P. 52. 228.

I sh^d doubt whether an in Court, where mispleadg, is made a ground for new
trial, the Ct wd allow it for the purpose of letting in these unconscionable de-
fences - and I take the principle to be, that these defenses are founded on
publick policy & convenience, & do not alter the real right between the parties.
Indeed this regulations "pro p^{ro}no publico" they are directly opposed to ^{the} private jus-
tice of the case for wh. new trials are granted. (1 Bl R. 35. 5th 1242. 3 T. R 124.) B. & P. 407

In Court new trials are never granted except on petition (in case of mis-
pleading) wh must state the plea wh he wishes to make, that the Ct see whether
it is suff: also that he is able to prove it, wh he must do on the hearing of petition
he must also shew that the new one sh^d not be givⁿ in wth under genl. issue in former one. -

How far is more suspicious by the introduction of unexpected ev^{ts} or mistake
otherwise than in pleads. a ground for a new trial? Com D. f. c. 1. 2 Atk. 319. Sta.
691. 2 T. R 131. 3 East 167. 222. 1 Bl. R 298. 3 Mag 86. 7.

In the Eng^d practice this is not per se a substantial ground, for a new trial,
tho connected with other circumstances, it will have some weight. -

11. If a material witness is absent, this inevitable accident, & from age
it may be a cause (5 Bac 252. 11 Mod 1. 6th 22.) as if he be taken suddenly ill &c.

But in Eng^d a new trial is not granted for this cause unless witness
make affidavit of what he knows; that the Court may see whether it is material. -

148 Sack 645. In. will it be granted for this cause unless witness make affidavit in favor of deft, if the defence to be proved is unconscionable? 5 Bac 252. Trial L. 3. Pl. 11.) L. G. thinks in this case it wd not be granted: for trial will not be postponed in such case (1 Bos & P. 454.) a fortiori a new trial will not be granted.

So if the attendance of a material witness is prevented by coining of the opposite party, as by arrest (5 Bac 252. trial L. 6.) So for bribery or any foul practice (post) 11. Mod 141.)

But in Eng^d rule to shew cause is not granted if a material witness is absent wilfully, or thro negligence of his own. remedy is as witnessed by an action on the case. The remedy as witnessed is however so precarious, that if he does not attend when properly summoned, the Ct will grant a copied for shff to bring him into Ct, & will sometimes postpone the trial until he can be brought: but a new trial is never granted, for this cause. (Sack 653. Barnes 322. 5 Bac 257. 2. Trial L. 6.)

A new trial is never granted for absence of witness whose testimony might have been procured by due diligence used by the party (5 Bac 252. trial L. 6. Pl. 14. 5 Com. 152. Sack 2647. Sta 691. 1 Wils 98. 2 Mod 22. Pr. ch 194.)

It seems from 2 Sk 319. 3 Sta 391. that surprise by the introduction of unexpected evil, is no ground for a new trial. But 1 Bl 298. it is decided contra. But there was in this case a mistake in the ev^d of one witness.

In Eng^d a mistake made by a material witness in his testimony on trial, is not a ground for a new trial. It wd be of dangerous consequence to grant one (5 Bac 253. Pl 117. Trial L. 6.)

12. Discovery of New Evidence, wh^{ch} is material, is said to be good cause for new trial in Eng^d. But the Law is not so. Ld Kenyon says that as often as applications on this ground have been made, they have uniformly been rejected. It is settled, that if by due diligence, the party might have known of the ev^d it is never granted (12 Mod 584. 5 Bac 252. Tr. L. 6. Pl 16. pr. ch 194. 1 Wils 98. 7 T. R 167. Sack 273. Killy 282. 2 Bro 270. 1 B. & P. 428. 20. 1 T. R 84. 713. 3 Morgans Est. 93.)

13. Misconduct of Parties. Treating the jury (mentioned ante 55.6.) keep- 149
ing away parties witnesses (th) be are good grounds for new trial (11 Mo 141. Bac 2. L. 6)

So if a party solicits a juror to find for him, or makes any representations in favor
of his own cause, & the verdict is in his favor, new trial is granted, even tho' from
the w. the jury could not find otherwise. - (5 Bac 292. 2 Roll 716. Pl 17. Moore 572.)

The same practice by the party's Atty has the same effect; i.e. when an
Atty before Trial writes to two jurors, stating the harshness of his clients case -
The courts do not enquire whether it had any influence or not. - (2 Vent 173.)

So any kind of embracery, practised by either party is good ground
for new trials (5 Bac 252. Trial L. 6. 11 Mo 117. 1 Vent 125.)

Embracery what? It is an attempt to influence a jury corruptly, as by
promises, bribes, persuasions, entertainments &c (4 Bl 140. 4 Com 140. 1 Hawk 237.)

In Ejecutib. the Eng^l formerly holden that they were not granted
in actions of Ejecutib, because the verdict was not conclusive (5 Bac 253. Tri.
L. 7. 1 Johns 225. Loe 648. 50.) the Com. did not is conclusive: no fiction there. -

The rule now is in Eng^l, that in these actions, new trials are as ready to be
granted as in any others, if verdict is for plff. Secur when for deft "except for
very particular reasons". When verdict is for plff, it changes the possession.
Secur when for deft in Ejecutib: - Here the parties are in "statu quo" (1 Barnes
323. 4 Bac 224. 5th 253. Tri. L. 7.)

It was formerly holden that after two similar verdicts a new trial brought
not to be granted (6 Mo 22. 5 Com 155. 5 Bac 243. Loe 649. 1 Ser 97. 15th 121.)

Now not so often awarded as in other cases (3 Bl 387.) But the old rule
is now exploded (4 Burr 2108.) and there are instances when there have been
as many as five new trials granted. So Mansf^d says there is no good
reason for saying that a new trial can't be granted, because there has
already been one (4 Burr 2538) & Chf. Just. M^d, sitting, in Phil^l said
he would grant new trials until doomsday, if the jury continued to bring in
verdicts so manifestly unjust. Same Judge granted 4. in an act of Ejecutib
New trials are not grantable on a ground not taken at the trial. -

it might have been there between 10 Mod 202. 3. 7

Criminal Cases. In such new Trials are not granted in criminal cases as to the jury in many cases in his favor. (1 Rost 86. 7. 3. Aug 108. 2 Stra 897. 1238. 1 Mils 17. 3 B. 57. 7. 9. in criminal just^{ice} for offences higher than misdemeanors, new Trials are granted in Eng^{land} to neither party. (6 T. R. 638.) There can't be a second Trial in such a case - a man cannot twice be put in jeopardy of his life for the same offence. - Note. If one is clearly unjustly condemned, the constitutional power vested in the executive is only a safe recourse.

When the offence is not higher than a misdemeanor the Ct may grant a new Trial in deft's favour (1d Ray 63. 6 T. R. 638. Stra 968. 1102. 5 B. 255. L. 9. 5 Burr 2669. a libel case. 7) So in case of perjury (Long 760. 1 East 157.)

Now for the Ct may discharge the jury before the issue is not completed to them, or not agreeing on a verdict vide 2 Hawk C. 147. 31. 2 Johns 301. Ray 84. 4 Co 65. Carth 465. Carth 501. 7 Johns 300. Goodwin's case, can't be done for mere disagreement of the jury, even perhaps with prisoners consent - clearly so I. think without it. Case 10 R 508 as people in Ross, can't be tried

But suppose a man dies, a prisoner is taken ill during the enquiry, in such case & others of clear physical necessity, can't it may be done, even in Floury, and a "verdict de novo" awarded. -

In Corn. new Trials are granted in favour of deft even in cases of Floury - not in favour of the Publick. (1 Rost 86. 7. 50 in the U. S. courts.)

But where the offence does not exceed a misdemeanor, the Engl rule is that no new Trial can be granted in deft's a delinquent: no man can be twice tried for the same offence (Stra 100. 1238. 1102. 7. 1102. 8. 1102. 9. 1102. 10. 1102. 11. 1102. 12. 1102. 13. 1102. 14. 1102. 15. 1102. 16. 1102. 17. 1102. 18. 1102. 19. 1102. 20. 1102. 21. 1102. 22. 1102. 23. 1102. 24. 1102. 25. 1102. 26. 1102. 27. 1102. 28. 1102. 29. 1102. 30. 1102. 31. 1102. 32. 1102. 33. 1102. 34. 1102. 35. 1102. 36. 1102. 37. 1102. 38. 1102. 39. 1102. 40. 1102. 41. 1102. 42. 1102. 43. 1102. 44. 1102. 45. 1102. 46. 1102. 47. 1102. 48. 1102. 49. 1102. 50. 1102. 51. 1102. 52. 1102. 53. 1102. 54. 1102. 55. 1102. 56. 1102. 57. 1102. 58. 1102. 59. 1102. 60. 1102. 61. 1102. 62. 1102. 63. 1102. 64. 1102. 65. 1102. 66. 1102. 67. 1102. 68. 1102. 69. 1102. 70. 1102. 71. 1102. 72. 1102. 73. 1102. 74. 1102. 75. 1102. 76. 1102. 77. 1102. 78. 1102. 79. 1102. 80. 1102. 81. 1102. 82. 1102. 83. 1102. 84. 1102. 85. 1102. 86. 1102. 87. 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A new Trial is never granted to a party who is able to plead the H. of Law. To in 157
Court, it was refused, when the object was usage.

Granting a new trial after judgment, vacates the judgment: but terms are imposed when necessary: & if pending the petition for a new trial, the respondent die, his exec^{rs} may be cited in by "T^e fa" (as in actions) and the petition may proceed, if the right of action survives to or as the Ex^r.

Note. As to this contract, the Stat^{ute} relating to abatement & amendments of writs, was made before Court. As had power to grant new trials. See vide Flord & q. 273. - If the right of action does not survive, in the last case, the petition must abate: for no new trial can be had, subject to the foregoing qualifications. The petition might doubtless proceed, if pending the petition, the petitioner sh^d die. -

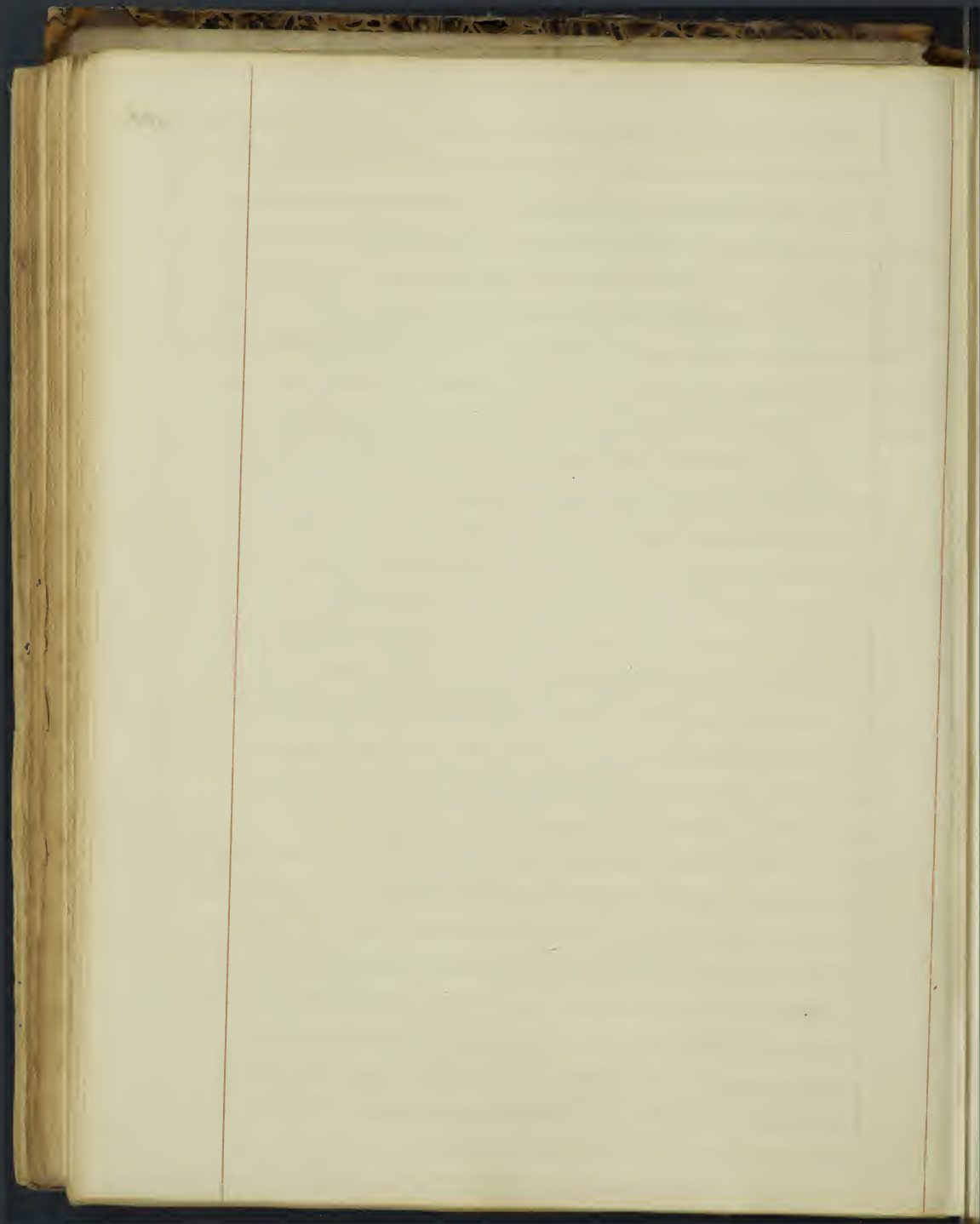
It has been observed that AM Trials may be granted after final judgment on the original trial. In such cases it vacates the judgment (i.e.) when the grant is unconditional, & the rights are determined by the second trial.

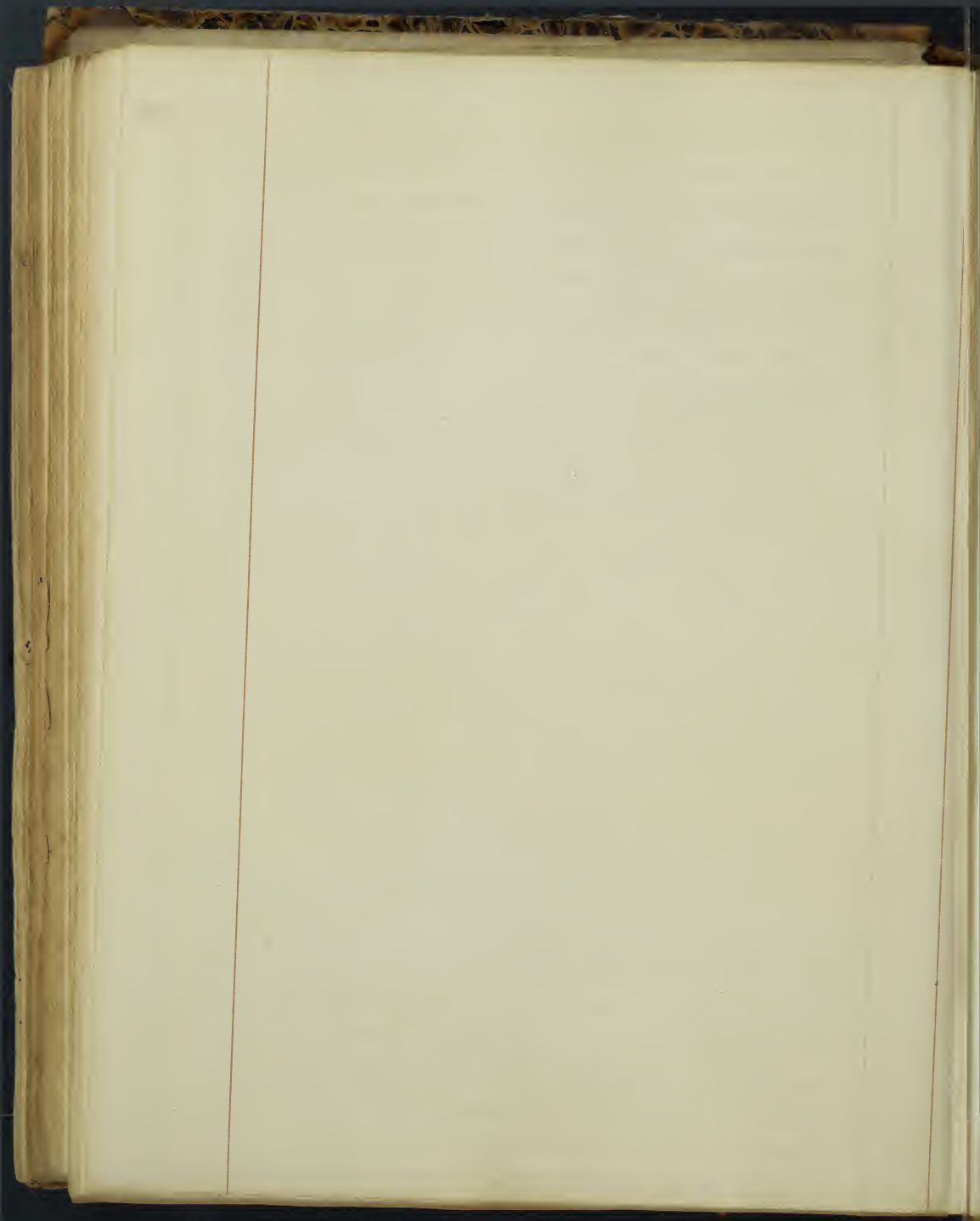
As to costs on new Trials vid 8 T. R. 617. 14 Bl. 637. 41. 3 T. R. 507.

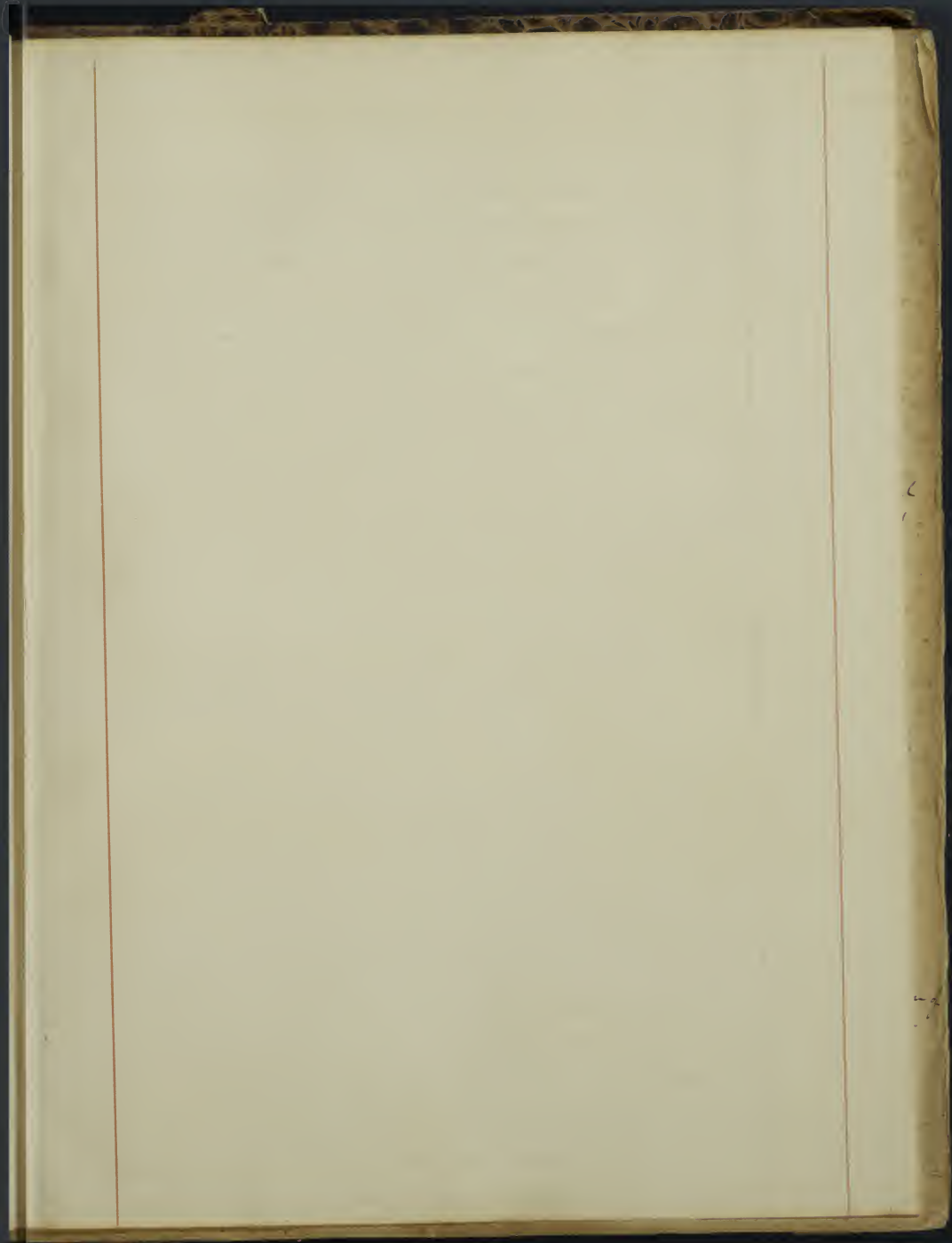
In Eng^l when the costs are directed to abide the event, if the party who was successful in the 1st suit or trial succeeds again, (i.e. is ultimately successful) he shall have costs of both trials. - But if the party in whose favour the Trial was granted, succeed in the 2^d suit, he has costs on the second only. Yet in this case, the other party has not costs of the 1st trial. These are not awarded on either side (supra as to costs.)

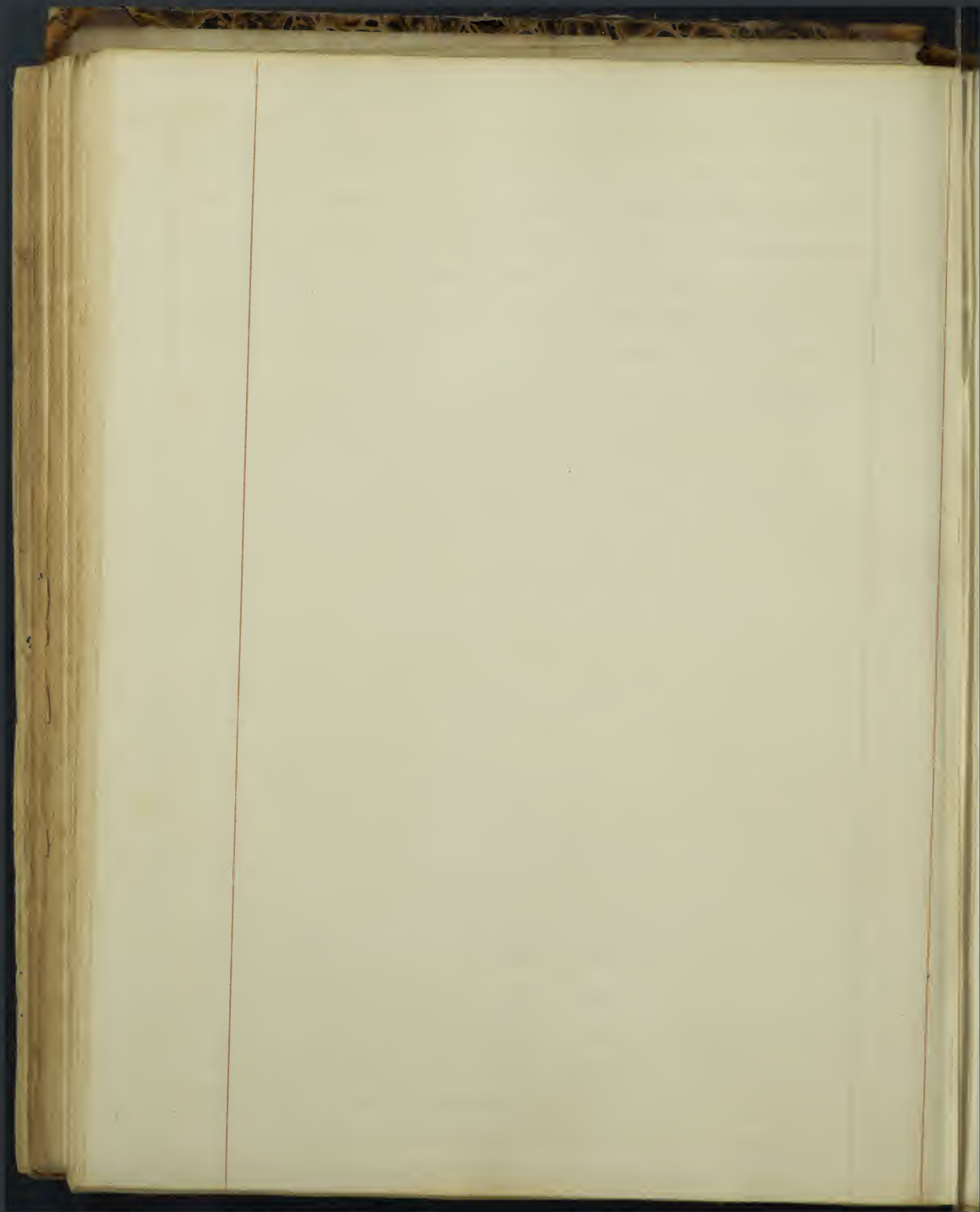
But where a new Trial was granted, and nothing was said as to the costs of the first, altho the same party succeeded in the 2^d Trial, he shall not have the costs of the first - (Doug 421. 3 T. R. 502. 12 207. 14 Bl. 639. 641.) - In Court. costs follow the event. -

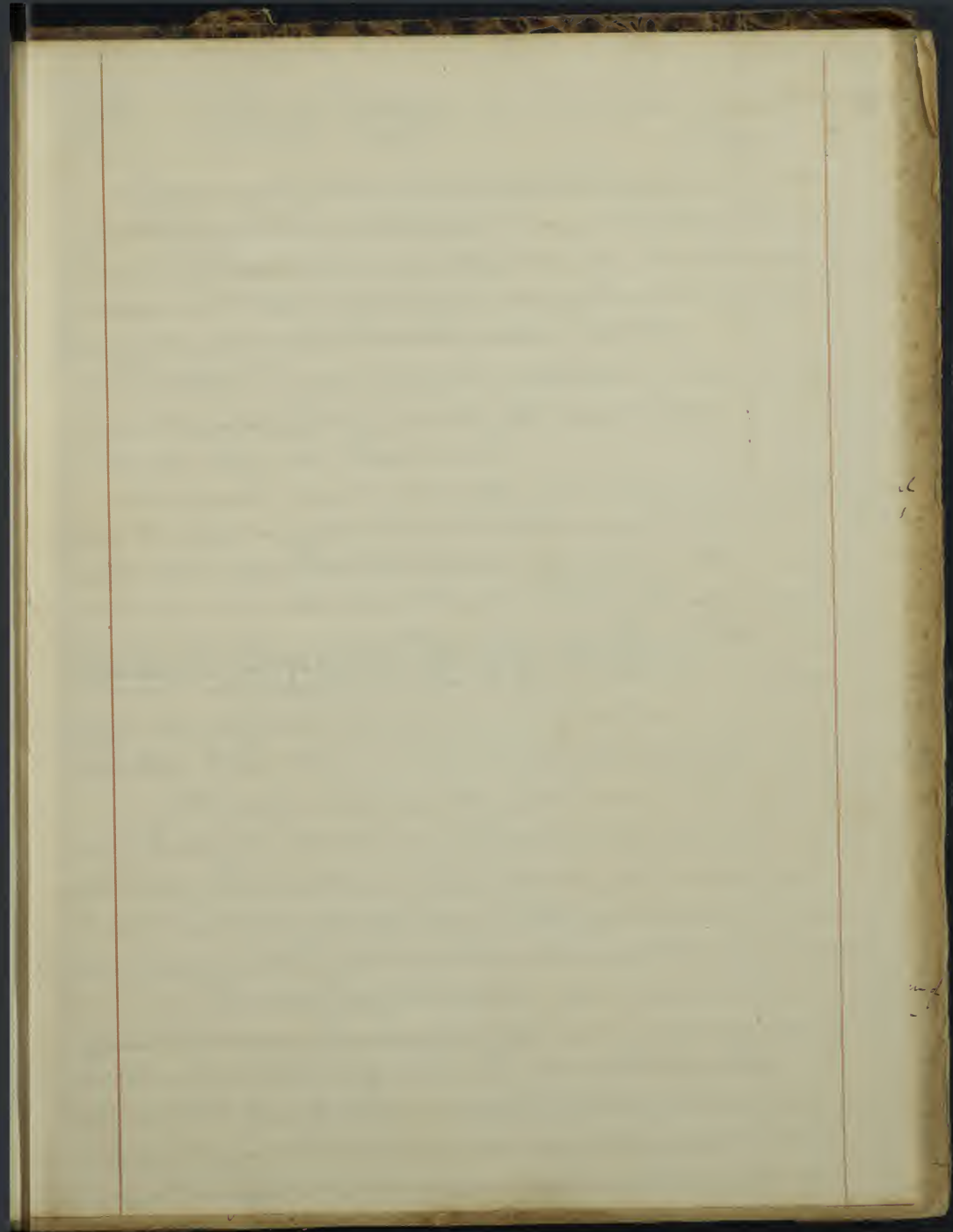
End of Pleadings Jan^y 3^d. 1826.

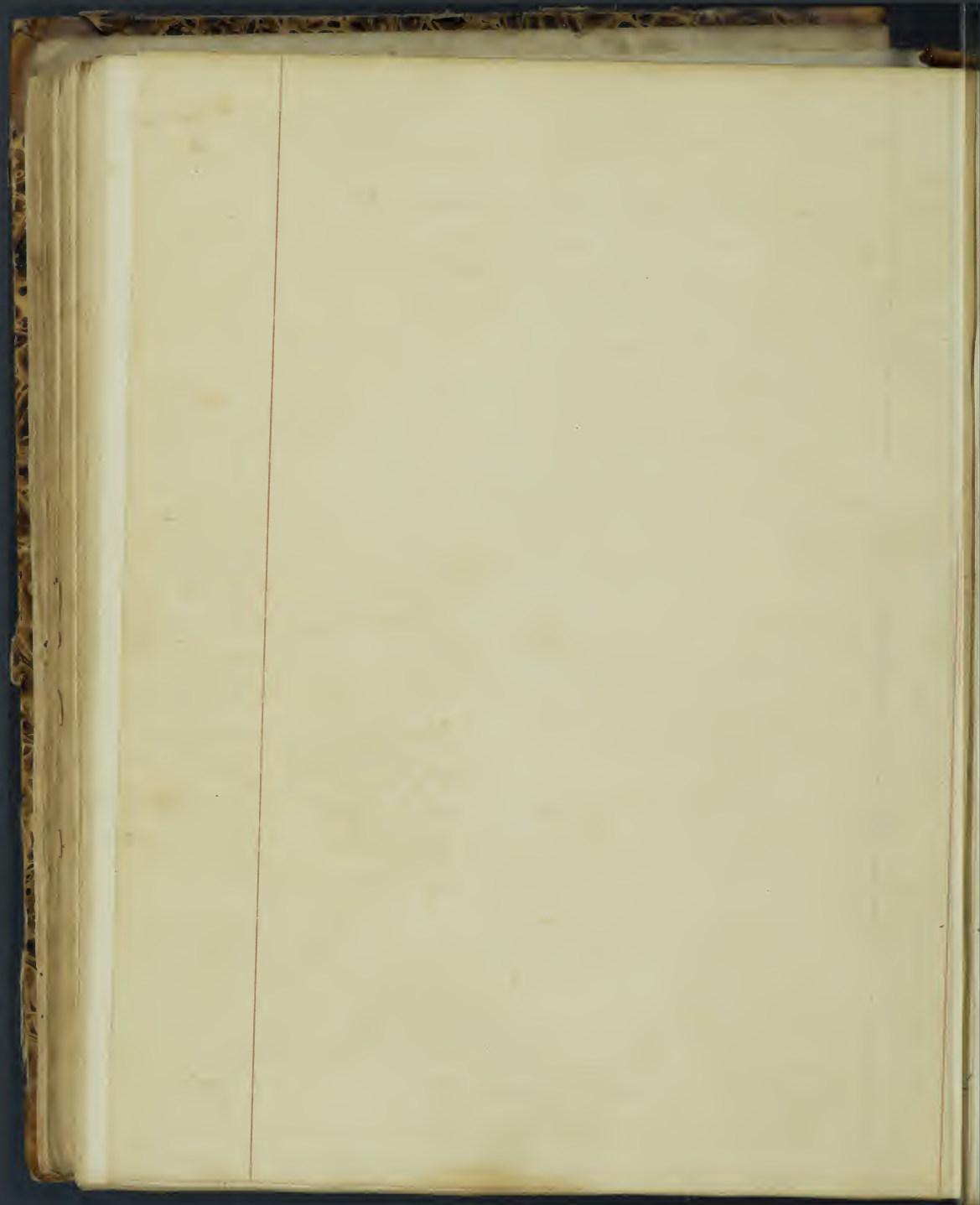












Title of Evidence by R.B. Miller. Litch. Jan 2 1826

4th 1826.

Evidence is used in the law for some proof, by testimony of men on oath, or by writings or records. It is called evidence, because thereby the point in issue in a cause to be tried is to be made evident to the Jury. It contains testimony of witnesses, and all other proofs to be given and produced to a Jury for the finding of any issue joined between the parties (1 Christ 283.)

The credibility and weight of evidence are generally to be determined by a Jury; its admissibility, being a matter of law, must be settled by the court. 2 H. Bl. 205. Doug. 360. Peck. 2. 3.

When however a record is put directly in issue by the plea, "and till General Record", the weight and effect of it are to be determined by the Judge. In this Rule case the issue is closed to the court, not to the Jury (Peck. 2. 3. 3 Bl 320. 1. 6 Co. 53. Co Litt 117. 260. 3 Bl 331. Lawes 146. 48. 224.) for a record is of too high a nature to be tried by a Jury or in any other way than by itself. But when a record is introduced except on a plea of and till record, it is introduced incidentally on an issue to a Jury, it is to be read as evidence to them, this in its effect it may be conclusive of the facts which it imports to find or establish. (Peck 2. 3. Post 38.) e.g. A judgment & execution exhibited in 20^e of title in 2 Jeckstr.

2. Neither party is bound to prove those facts which are not denied: for such part of the pleadings on one side, as are not denied on the other, are of course admitted to be true. (Peck 4. 5. 4 Bac 2. 73. Bull 298. Dyer 183.) and an admission on the record, by one party, of any allegation on the other side, precludes the former from denying on trial the fact so admitted. (Peck 4. 5. 4 Bac 2. 2. Mod 5. Bull 289.)

The burden of proof lies regularly upon the party who takes the Burden of proof affirmative of the issue: for in general a negative does not, from the nature of the thing admit of direct proof. (Peck 5. Bull 297. 8. 2 Roll R. 400. Phil. 20. 100. 4 JR 33. 8. 126 144. 829.) But there is an exception to this rule when one is prosecuted for not doing an act which by law he is bound to do - for in such cases to presume the negative would be to presume guilt - and this exception holds

153. as well in civil as in criminal cases (Poth 56. Gill 20. 148. Bull. N.P. 298. 3 East 192. Phil. 137) e.g. Indictment for not repairing a bridge or highway (and this exception holds in all cases when the omission ^{neglect of duty} amounts to a crime.) Note - does it hold however unless the alleged omission of duty amounts to a criminal neglect? (3 East 192. 200. 1.)

And if issue is taken on the life or death of a person once existing, the burden of proof lies on the party asserting the death (2 Phil 152. 2 East 312. 2 Roll R 241). - for the legal presumption is, that the person once living continues, so, till direct & presumptive evidence to the contrary appears - and the rule would be the same, (S.B.) tho that party, tho that party should plead the fact in the negative and by alleging that S. is not living. (Poth 313. 2 Roll R 461.) Scias after an absence of seven years unheard of (Stat. Dist. ch. 11. § 11) De Bigamy (Poth 152. 6. 8 East 80. 5. 2 Camp 113.) Tonic cum under the stat of Divorces. -

So a legal marriage being proved, legitimacy of issue, born during wedlock - is presumed - (Phil. 26. 152. 112. 152 Parent & Child.)

General character of witness
No other evidence can be received than such as is pertinent to the issue - a matter of fact in dispute - other evidence than this is called irrelevant (Poth y. Poth. 6. 2 A. Pl. 205) hence the character of either party in a civil action cannot be called in question, unless it is put in issue by the proceed^g themselves, (e.g.) unless it conduces to prove, a dispute some matter of fact involved in the issue (Phil. 6. 139. Poth 6. Bull 298. 296.) Thus in an action for fraud the plff is not at liberty to prove that deft is reputed a knave, nor in an action of slander that he has the character of a defamer. nor is deft in such cases allowed to support his character by proving the contrary (2 B & P 532. 3 Cruise 20. Phil 139 n.a.) for the evidence is considered as not conducing in any degree which the law can regard, to prove or disprove the matter in issue. -

In cases in which the party is by that law allowed to testify in his own cause, and does testify, his character for veracity may be impeached. But in these cases he is impeached not as a party but as a witness. -

But in an action for civil conversation the best way in mitigation of damages, not only 154
impeach the general character of Plffs wife, but may prove particular facts of her in-
continency with others - for Plff by charging deft with seducing her, puts her character
for previous chastity & her genl behaviour in issue. (Pezk 7. Bul 276. 2 Esp. cas. 562.
1 Sel. 301. 2 S.R. 457. Gibb 20. 113. Phil 139.) But deft is not allowed to prove instances of
her misconduct, subsequent to her alleged adultery with himself - for such miscon-
duct may have been occasioned by his own wrong. - (Pezk 7. 1 Esp. cas. 562. 1 Selw 31.)

In an action for breach of promise of marriage also, deft is allowed
in mitigation of damages, to impeach the genl character of Plff for chastity, and
to prove instances of her licentious conduct (1 Selw 36. n. Johns cas 116. 3 Mass R. 189. 3 Esp. cas 2361.)
for the action puts her character and conduct at issue as in the case of adultery.
It ste. Du. may he not impeach her moral character in any & every respect? *Wolch v. Bolton*

But it has been holden when deft has seduced Plff - that evidence of her genl char-
acter cannot be given, in this action, in reference to the time between the making
of the promise & breach of it - (3 Mass. R. 189.) as the seduction itself may have been
the cause of her loss of character - This seems to be a correct distinction: sed vide
1 Johns cas 116. contra. Du! would not actual prostitution by Plff, discovered by
Deft after making the promise, be a bar to the action?

So in an action by a parent or master for seducing his female servant,
"per quod servitium amittit," deft may in mitigation of damages, impeach the genl
character of the daughter &c for chastity, & prove her conduct to have been li-
centious (1 Rost 472.) for tho the loss of service is nominally the gist of the ac-
tion, it is not when the parent sues, the rule, or principle, ground of damages
when a parent is plff it is the violence done his affections, and the disgrace
occasioned to his family (3 Wils 19. Esp. d. 645. Lawes 67. 2. 11 East 23. 5. 2 Selw R.P. 1077.
2 Selw 163. 122. par. & ch. 111.) Du. can he shew that her character was bad after the seduction? *Carba 2. G.*

But a previous promise of marriage cannot be proved in this action in aggra-
vation of damages, as that entitles the daughter to an action in her own name
(1 Johns 297. 2 Selw N.P. 188. n.)

155 In actions of slander it is the constant practice in com. to permit the deft, by way of mitigation of damages, to impeach the genl character of Plff, as to the species of crime or other matter charged by the words laid, viz. to prove his genl reputation bad in this respect (Post 354. 450.)

In Eng^d there is no such genl rule (Phil 140. 6. Mass. R. 572. 10 Johns 46.) but of late, the constant rule is adopted in Eng^d (2 Camp 257. Pick. ex appx.)

In Slander Plff may give evidence of his rank & condition in life, to aggravate damages: deft may do the same to mitigate them (Phil 140. 3. Mass. R. 557.)

In actions for malicious prosecutions, deft may shew Plff's genl character to be bad by way of shewing probable cause (Phil 139. 2. Esp 720.)

In criminal cases also, when deft's character is put in issue by the prosecution, the prosecutor may attack his character by proof of particular facts; otherwise it would be impossible to prove the charge (vid. next p. Pick. 7. Bull 296. 1 Mc Nally 324.) But a criminal prosecution puts deft's character in issue only when it charges a habit or course of criminal conduct, as contradistinguished from individual specific acts, e.g. an indictment for keeping a lewd house & for being a common scold &c.

Q. can he in such cases enter into deft's genl character, unless deft has first produced evidence in support of it? Contra L. G. 1 Mc Nally 324. Bull 296. Post 6.)

But there is a case of this sort in which prosecutor is not allowed to examine as to particular facts, without giving previous notice of them viz: when one is indicted for being a common barrator (Pick. ex. Bull 296. 1 Mc Nally 324.) This rule is founded on the presumed difficulty of defending agt particular charges without such notice - the prosecutor being generally vs those whose profession it is to carry on.

But in criminal cases in which character is not put in issue, as on a prosecution for theft, forger, or any other individual specific act, the prosecutor can't examine into the character of deft - unless the latter has exhibited evidence in support of it (Pick. ex. Bull 296. 1 Mc Nally 324.) for the act wd be evident - since a particular act only and not the genl conduct or character of deft is put in issue by the prosecution.

And even if deft has thus forced the enquiry (post 18) the prosecutor cannot

examine as to particular facts, not alleged in the complaint; but as to good character only: for deft can't be supposed to be prepared to disprove particular charges not put in issue by the prosecution, & without notice. and when his character is not put in issue, there can be no legal notice of them (Pall 296. 1 McC. N. 324. Per. 7. 2. Sec. 2. 146.)

But in criminal prosecutions in wh. the defts good character is not put in issue, he is indulged in proving, that his good character is good (McC. N. 320. Ph. 146. 2 R. 8.) 7.
e.g. on a prosecution for theft, forgery, perjury &c. This rule is founded in the benignity of the Law towards persons accused of crimes - for it is in strictness, no more relevant than contrary evidence (in the first instance) on the other side. This indulgence was formerly allowed in favour of a witness - i.e. in capital cases - but it is now extended to cases not capital, as misdemeanors (McC. N. 320. 2 Lev 141.) where the direct object of prosecution is to punish the offence & not barely to collect a penalty. Phil 140 2 B. P. 532. n.

It is not allowed in actions & informations for mere penalties inflicted by penal Statutes - These being regarded as not purely criminal proceedings, or as direct prosecutions for crimes (2 B. P. 523. n. R. ex. 8. Ph. 139.) Qu² Suppose the offence incurring the penalty is malum in se would not it be admissible? (Ph. 140.)

Park says indeed, that the rule extends to no other than prosecutions for offences incurring capital punishments. (Park 8.) sed Qu. for his authority (2 B. P. 532. n.) does not seem to support so good a proposition, & there are opinions directly opposed to it. (McC. N. 320. n.) besides there appears to be no sufficient reason for such restriction - it would exclude offences wh. at Com. Law incur a fine. (C. d. G.) The nature of the offence would seem to furnish the only criterion. (Phil. Ex. 140.)

On an indictment for a Rape the prisoner may give in evidence, that the woman's character is notoriously bad in point of chastity - & that she had previous criminal intercourse with himself; but not that she had had such intercourse with another (Phil 140.) She is supposed to diminish the probability of his evidence in the two former cases - in the last it is not.

Evidence in support of defts character in a civil prosecution may be particular as well as general. i.e. the witness may not only testify in favor of defts good character

157. ter, but may assign particular reasons for his opinion (McTally, 322. 24. N. H. R. 141.)
This is a dangerous sort of ev^e tending to make an undue impression upon the
minds of the Jurors (ante 7.) but ev^e as his character must be good only, for the
reason before given - (p. 6.) Brill sup. 296. Lev. 20. 141.)

In cases in wh. the ev^e of guilt, or ^{is weak} merely presumptive, proof in support
of def^t character, is very important. (P. 20. 8.) but in opposition to direct &
credible testimony, it is genly. of little avail (Phil 146. 2 Mass R. 317.)

Best ev^e In all cases, the best evidence of wh. the nature of the case admits
must regularly be produced - withholding this, and exhibiting ev^e of an
inferior sort, a secondary ev^e, affords reason to conclude, that the former
would operate as partly offerring the latter (P. 8. 9. 102. Lev. 20. 157. 1 McT. 342.)
- thus if a party wishes to prove the contents of a written instrument in existence
and in his custody, the instrument itself must be produced - the contents
cannot be proved by parol ev^e - nor by copy (P. 20. 9. 10 Co. 92. Sug. 20. 25.
1 McT. 356. 7. 60. 2 St. 463. 9. Chy 79. 132.) As to instrument lost or in possⁿ of the ad-
verse party (vid. post 39. 69. 79. 80.)

So also if a deed is attested by a subscribing witness, the execution can regu-
larly be proved by no other ev^e than his (Reg. Sug. 20. 25. 1. Doug 205. 16. 1 Esp. 189.
10 East 53. 2 St. 133. Exp. d 257. 3. Leach c. c. 284.) or rather it cannot be proved with-
out his testimony - tho' it may be as his denial. For except to this rule and p. 80. 2.)

But the law does not require that all the ev^e that might be produced,
should be - hence the evidence of one of two or more subscribing witnesses
may be sufft to prove the execution of a deed (P. 20. 9. Sug. 27. 8. p. 80.)

Proof of fact. In Genl. no prescribed number of witnesses is necessary at com. Law
to establish a fact - such ev^e as satisfies the Jury is sufft. Of course one
credible witness is all that the Law requires (Case 146. 1 Shaw 148. Sug. 20
142. 1 McT. 16. Pl. 107. Co. Litt 6. n.)

On a prosecution for perjury, however, two witnesses are neces-
sary for conviction: for if there were but one there would be only oath vs oath.

Pr. w. 9. 4 Bl 358. 10 Mod 194. 1 Mc Nally 137. Phil 107. and 1 Mc N. 31. 2 Hawk p. c. 25- 158
whether it was required by the ancient com. Law. The rule however, does not,
it is said, absolutely require two witnesses - but there must be some independent
evid^e in addition to the testimony of the Phil 108 witness. -

In high Treason also, and in petit Treason, and in Misprision of
Treason, two witnesses are required by sever^e Eng^l Stat^s: the first of wh^{ch} is that of
Ed. 6. (Pr. w. 9. 10. 4 Bl 358. 7. 1 Mc N. 13. 21. Phil w. 108. 14. n. 6.) Note. Treas^r
in high Treason, concerning current coin, counterfeiting the King's Signet.
Under Stat 162 Phil 6 Mary. (Ph. w. 108. 9. 1 East p. c. 129.) But this was
not the rule of the com. Law (Semb) 2 Hawk. p. c. 25. s. 179. 3 Kelt 68. 1 Mc N. 137.

And in Treason by Stat 7. Wm 3 both witnesses must testify to the
same overt act, or one of them to one overt act & the other to another (4 Bl 357
1 Mc N. 34. 21.) Otherwise the prisoner cannot be committed except upon
confession in open Court. - But by constitution of U. S. both witnesses
must testify to the same overt act, unless prisoner confesses in open Court (emb. s. sec. 3.)

The rule requiring two witnesses in cases of Treason, extends however, only
to overt acts of Treason; collater^{al} facts, &c. i. e. facts not constituting or tending
to prove the overt act, may be established by one witness (e. g. that the
prisoner is a natural born subject) (1 Mc N. 34. 5. 26. 3. Foster 240. 5. Hal. p. 134.)

In perjury also, the taking of the oath under wh^{ch} the crime is alleged
to have been committed (and the fact says Mc N. 2n. what fact?) may be
established by one witness (1 Mc N. 37.)

It is a rule in Civ^{il} also, founded on the principle wh^{ch} governs in the
case of perjury, that if Def^{'s} answer is contradicted by one witness only, Plff^{'s} cannot
have a ^{decree} - for the answer being under oath, there is only one oath as
another - (1 Ven 161. Par. m. 274. 1 Ves 66. 95. R. ch. 19. 2 Bosc. 216. Bull 285. Exp. d. 709.
7. T. R. 667. Phil 110. 1 Ves 64. 3 Atk. 646. 1 Ves 97. 125. 2 Ves 243. 7 At 282. 3.) but as
in our practice, the answer is not under oath, the rule does not obtain here -
And by Stat Law of Crim, no person can be convicted of any capital crime

Hearsay.
Evid.

but upon the testimony of two or three witnesses, or that wh. is equivalently (Harcourt 685) in the construction of this stat it is not necessary that two witnesses should testify to the same fact or fact - one may testify to one part of the transaction and the other to another or the testimony of one may be direct, and of the other circumstantial, or both may testify, to facts merely circumstantial. In either of wh. ¹⁰⁰ 60. 142. cases, if the witnesses are credible and their testimony satisfactory, they may convict.

The declarations of a stranger are regularly no evidence unless made in court and under oath (by stranger is meant one not party to the suit). Hence

If even a judge or juror is acquainted with any of the facts in issue, he is to be sworn and examined in court (R. 20. 10. 1 R. Wm. 146. 2 Mod. 99.)

It follows from this principle, that hearsay evidence, i.e. testimony by one person of what he has heard another say, is in itself inadmissible. for 1st the witness does not testify to the fact in question, but to the declaration of another respecting it - and this declaration is not in court by one sworn in the cause, as all testimony is regularly required to be: 2^d There can be no cross examination, as to the fact in question (R. 10. 5th. w. 107. Sugr. 1. Ep. d. 784. Bull. 296. 2 East 54. R. 173.)

Exceptions. 1st When the fact is in its nature, or in common presumption, incapable of positive and direct proof (R. 20. 11. Lev. 2. 12. 2) as on questions of custom, prescription, pedigree &c. (Esp. D. 738. Bull. 233. 10ll. C. T. 303.) thus on a question of custom or prescription wh. can be proved only by usage, genl reputation may be produced by hearsay evid: for being immemorial, no one can testify to their creation or origin &c. A witness may state that he has heard from dead persons, respecting the reputation of the right in question, but not what they have said relative to facts showing the exercise of it (R. 20. 13. Sug. 132. Phil. 182. 1 T. R. 565. 2 V. 512. 12 East 62. 14 East 317. n. 331. n.) 13

Hence on a question respecting ancient limits, a witness may testify what have been the reputed limits, and what deceased persons have said respecting them; But not what they have said relative to a former existence of a building or wall in such a place; as the latter wd be evidence of a particular fact and not of genl reputation. - (R. 13. 14. app. 69. 2 T. R. 53. R. 182. 3. 14 East 331. n.)

But declarations of persons having at the time, any interest to make for themselves or others are not admissible (Pr. 180.3. 173.)

Evidence of reputation is, upon the same principle admissible in questions respecting the right of way (Pr. 12. Bull 295) as on the declⁿ of deceased tings (Bull N. P. 295.)

Upon a question whether a certain piece of land was parcel of an estate, the declaration of a deceased Feud has been admitted in 202 (Pr. 13. 2 T. R. 53. Ph. 182. 1 Ed Ray 734.)

Entries by a deceased steward of monies received in satisfaction of trespasses upon a waste, have been deemed admissible to prove the right of soil. (Pr. 10. 12.)

15 So entries by a deceased officer of a township, of monies rec^d of those of another township, have been admitted to prove the liability of the latter township. The entries having been made, when no dispute existed, and by persons who made themselves chargeable with the money (Pr. 10. 12. 13. do appx. 53.) But entries made by one claiming to be the owner of the land, of money paid him by the Feud, is no evidence of his title, even as between other parties (11. 5 T. R. 141. 31.) he being interested at the time of the entry, to support the title, wh. the entry wd go to support. — Still however ev^d of the declⁿ of the dec^d owner of land, restraining the limits, claimed by those who derive title from him, is always admitted (11. 5 T. R. 123. vid. post 22. 2 T. R. 58. 1 exp 453. 4 John 229. 10. 11. 337. Ph. 173.)

On questions of pedigree also, the declarations of dec^d persons, who from their situations were likely to know the fact, may be given in ev^d: as facts of this kind can frequently be proved no other way. 24. 91. declⁿ of dec^d parents, upon a question of legitimacy, whether a child was born before or after marriage (Pr. 11. 12. 182. 3. 6 T. R. 330. Cowp. 571. 2 T. R. 719. Bull 112. 294. 24. 92. Phil 174. 180. Exp. d. 74. 81. Ray 34. 10. 11. 330 n. 182. 114.

But the declarations of a dead relative are admissible only when they are supposed to have been made without any interest or bias of the person who made them. News if made in relation to a suit depending or contemplated (Phil 176. 9.) This there has been some contrariety of opinion on this point (Viner ab. 10. 6. Big. 114. 182. 330 n. 182. 174. 2 T. R. 11. 12. 182. 3. 6 T. R. 330 n. 182. 114.)

But the declarations of deceased parents are not admitted to prove non-access during wedlock. This is forbidden by considerations of morality, decency & policy. Parents

161. cannot thus bastardize their children born after wedlock (R. 12. 183. 571. 2. 2 Dec 112. Esp. Di. 488. L. w. 123. Ph. 1801. Hard 79. 8 East 203. 11 Id 133.)

Declarations of mere strangers (as deceased neighbors) are not admissible in questions of pedigree, as to prove the time of a birth or marriage (Ph. 178. 13 Ves. Jr 147. 814. 3 T. R. 723. 1 McC. N. 312.) for they are not supposed to have the best means of knowledge (Bull 295. 14 East 320. Silw 887.) But the declaration or name of a deceased surgeon as to the time of a birth wh. he attended is evidence. (Ph. 181. 10 East 120)

Vin. ab. w.
J. B. 91.

The gene reputation of a family, or the place to wh. one belongs, is admissible when his pedigree is in question (P. w. 11.) Thus the declarations of neighbors, according to the gene rule are not. -

The hearsay (or declaration) of a relative is not admissible in these cases, if he is living and can be produced - it is not the best evidence (Ph. 176. 2 T. R. 24. Bull 113. 3 Comb 457.) he shd testify in Court. -

To prove the state of a family as to marriages, births and deaths, declarations of deceased persons likely to know the fact; and the gene belief of the family are good evi. 4. ge. to prove when A married - what children he had, whether such a member of his family died abroad, what is the age of a child &c. (R. 12. Bull 294. 5 Esp. d. 738. 80.)

In these cases also, a recital in a deed, a special verdict stating the pedigree thro' between other members of the family, monumental inscriptions, heraldic visitations in a family bible or other book - and statements in a bill in Chancery are good evidence - these being all in the nature of declarations out of Court (R. 12. Bull 294. 5. Esp. d. 738. Ph. 175. 6.) So statements in a will by an ancestor tho' cancelled. - (11 East 515) and engraving upon rings (Ph. w. 176. 13 Ves. Jr 144.)

So of the declarations of a deceased husband of the legitimacy of his wife (13 Ves. Jr 148.)

But hearsay is not evi. of the place of one's birth - for this is not a question of one's pedigree, but a simple point of locality to be proved like other ordinary facts (8 East 539. 1 Johns 373. 3 T. R. 707. 2 East 27. 54. 63. Sug. w. 120. Esp. d. 705. Ph. 180.)

In some cases also, not within these exceptions as to hearsay evi. a name made at the time of the transaction in question, by a deceased person, in the

1 Ph. 175.

ordinary course of his business, is admitted with other circumstances as uid. (P. 116.)
 24. q. entries by a deceased drayman of beer delivered for his employe, the course of business being proved for the drayman to make daily entries (P. 116. n. Salk 285. 690. Bull 282.

17. So an entry in an Attorneys office, for drawing a surrender (he being dead) was admitted as uid. of a surrender - it being corroborated by long possession (P. 15. Sta 1129. & uid Salk 245. 280.) for other cases of this kind uid P. 14. 15. n. Bull 282. 3. Salk 285. 280.)

And an entry made in party's book by himself has been received, in confirmation of the testimony of a witness who had sworn that he had seen the article delivered, and saw the entry soon afterwards. (P. 15. n. 1 Rep. 328. Bull 294.) here the w. is not produced as such in chief i.e. as uid. of the fact in question, but to corroborate the testimony of the witness - But entries on a party's book are never in themselves uid., tho they may be so in connection with concurring uid. (P. 106. n. 1 Ph. 175. n 261)

8. In criminal cases, the rule excluding hearsay uid. appears somewhat more strict, than in civil - but it may be admitted by way of inducement, for the purpose of illustrating that wh. in itself is proper uid. as well in the former case as in the latter (1 N. H. 282. 360. 14. 297. 301. Bull 296.) 24. q. 6. that wit had heard that the crime was imputed to Deft, and informed him of it by way of introducing Deft's declarations respecting it. - 2. When confessions or declarations of Deft are made with reference to any report or hearsay - the report &c ought to be proved to shew what was confessed. -

2^d But there is an important exception to the general rule as to hearsay uid. in prosecutions for murder or (I presume) for any species of homicide viz. the declarations of the deceased, made under the apprehension of death, as to the commission of the offence, are admissible uid. For this situation is considered as creating a sanction or assurance equal to that of an oath. (P. 15. 16. Leach c. c. 583. 67. Sta 499. Sug 124. 1 N. H. 381.)

But declarations thus made by persons legally infamous, as an attainted felon are not admissible - for his testimony under oath could not be received (P. 20. 16. Leach 318. 378. Sug 175. 1 N. H. 387.)

The declarations of a person mortally wounded, but not under apprehension of death are not admissible - for the sanction arising out of that apprehension is wanting.

163. Sugr 124. 1 McC. N. 383. 5 Leach c.c. 364. 52. 397. 363)

It is not necessary that the party making such declaration should express any apprehension of approaching dissolution, in order to render them admissible - if it can be collected from circumstances of the case that he was under such apprehension, they are admissible. (Sugr 124. 1 East. h.c. 353. Leach c.c. 363. 1 McC. N. 383. 5) It seems then that the question whether such an apprehension existed or not must be judged of by the Court, for the purpose of deciding whether the declarations are admissible. (Sugr 125. Leach 363.) But the decision or opinion of the Court upon that question is not conclusive - it is still to be left, as well as the credit due to the declaration to the Jury. (1 McC. N. 383. 6. Leach c.c. 364. 97. 363.) and if they think that no such apprehension existed, they are not to consider the declarations as evidence. -

Swearing declarations are, under the same limitations, admitted in civil cases: ex. gr. that a certain will was executed - that another was forged by himself. (1 McC. N. 383. 3 Burr 1244. 55. 6 East 188. Sugr 125. Post 67. 100.)

Third. What a dead person had sworn before on a trial between the same parties, may always be proved - for he was under oath and liable to cross examination ^{why not?}
2 P.W. 573 (vid ante 12) aliter in criminal cases (P.R. 20 60. 1 McC. N. 283. 5 T.R. 373. Post 397. 2 Hawk 605-6)

And what a witness absconding has sworn before a court of quarrying may be proved as deft if he procured the witness to abscond - see not (Hawk 605. 1 McC. N. 283. 6. 6. Keble 55. 1 Post 76. 1 East 373.)

Fourth - what one of the parties has said in relation to the matter in issue, may always be proved by the other - a person's confession being always good evidence - as himself (P.R. 20 16. 7 T.R. 663. Swift 20. 126. Ph. 71.) his acknowledgment however is not always conclusive evidence - as himself. ex. gr. if deft has acknowledged indebtedness, he may still deny & disprove the fact (Ph. 74. 78. 9. 80. 1 B & P. 49. 10 Mass 39.) So as the case may be, tho' the acknowledgment is in writing, as a bill of lading that the goods shipped are in good order. (Ph 74. n. 7 Mass 97.) But his confessions are to be proved not by itself as the case may be: for if he had accompanied it with any other declarations relating to the same subject, the whole must be told. But he is not entitled to the benefit of any qualifying declarations, wh. he may have made

at a diff't time (Sw. 20. 126. Ph. 79. 80. (East 402. 12 Vin. ab. 23. 3 Camp 215. 14 497)

And a party is never allowed to introduce his own declaration as ev. for himself, except when they constitute a part of the "res gesta" a matter of fact in issue, as in the case of a parcel contract: or a case of assault explained away by words, or when they accompany any act of his that is in question. Ex. in case of tender, the declaration of the debt, or as to the purpose for which the money was offered, may be proved in his favor (Sug. w. 130. 6 East 188. 1 Ashm. 57. Exp. 312. 1 Mod. 3.) the rule is the same in criminal cases (1 McC. N. 373. 57. Hawk 133.)

In one instance, what a party has sworn in his favor in a former case, may be proved viz: in an action for malicious prosecution - otherwise he would be exposed to great injustice: same rule as to what his wife swore (Swiff 130. 6 Mod. 216. Bull. N. P. 14. Exp. 534. 6. Post 129.)

But his confessions are void of himself whether he sues or is sued, in his own right or as a Trustee - for he is party to the record (Pr. 10. 7 T. R. 663. Sw. 128. Ph. 72.)

So of the confessions of a party really interested, tho' not a party to the record: ex. gr. thus in debt on bond bnd by A. conditioned for payment of money to B. B's confessions are void for debt (Ph. 72. 1 East 578. 589. 1 Will. 257. 3 Camp 465. 10 East 395.) and what has been asserted by another is a party in interest, and in his presence and not contradicted by him, is void of him: for his silence as the case may be, may fairly be construed into a confession (Pr. 16. Sw. 117. 9.)

But declarations of stranger, and even of a servant, wife or child of a party in his absence, are regularly not void of him (Pr. 16. 7. 2 Str. 994. 6 T. R. 680. Will. 577. Sw. 127.) ex. gr. wife's acknowledgment of having rec'd wages earned by herself (2 Str. 946.)

So in an action by Husband & Wife as executrix, her acknowledgments after marriage are inadmissible (6 T. R. 688.) for during coverture her powers as executrix are suspended. -

So in an action for seducing Plff's wife (Will. 577.)

So of the acknowledgments of any individual member of a corporation aggregate, not made in the exercise of any corporate duty (Ph. 74. 4. 3 Day a Doug 493. (Post 117.)

Fifth, but where a wife in transactions usually regulated by her, makes a contract by the Husband's authority, express or implied, her declarations are void of him, ex. gr. her acknowledgment that she had agreed to pay a certain weekly sum for nursing a child (Pr. 17. Str. 577. 1 Exp. 182. Sw. w. 127. Exp. d. 721.) In whether this is correct in principle is not subject to the transaction. -

namely a venture 6 T. R. 680.

Sixth. The admissions & declarations of a servant or agent, if made at the time of transacting the principal's business, and are relative to it, may be void as him or for him; they are then part of the "res gesta" (C.P. 18. 37. R. 455. Sw. 127. vid 2 ell N 820. 6. Best Wife 56. Ph. 71. n. 74. 10 bes de 127. 7 J. R. 665. Ph. 75.) ex. gr. declaring a writing deliv for his principal to be an absolute deed or an escrow, declaring his knowledge of defects in goods purchased for his principal. Sec if they relate to antecedent facts, or such as are foreign to the business of the agent (J. R. 608. 5. 6. 665. Swift 127. Ph. 75. 8. 5 Exp 74. 135. 200. 371 n. 2 Coup 555. 11 bes de 127. 1 Exp 375.) the same distinction holds as to the declarations of an inter-
preter between the parties, made at the time of the negotiations & afterwards. (Ph. 77. 118. p. 171.)

5 J. R. 772.

The declarations of a Bankrupt of his motives for absconding made at the time, are in an action by his assignees to prove the fact of Bankruptcy, it is part of the "res gesta"; -

Seventh. In an action by the husband upon a policy upon the life of his wife, her declarations as to her ill state of health, at the time the insurance was effected is void as him. - for sometimes the existence, and frequently the nature of bodily complaints cannot be known to others, except by the information of the patient (C. Best 188. Swift 128. 30. Ph. 187. Skinn 400.) This exception is allowed from the necessity of the case. -

Upon the same principle, in prosecutions either civil or criminal for battery, the declaration of the person injured, respecting the bodily pains occasioned by the injury and made at the time of suffering them are always admiss in evid (R. 130. Swift 130. 7.)

Eighth. When a party to a suit represents or stands in the place of another person, the confessions of the latter are void as such party. ex. gr. Confessions of a Testator in void as his Exr: of an ancestor or his heir when suing or sued as Exr. or heir (Swift 128.) - for as the confessions of a Testator would have been void as himself if living, they ought to be such as his representative. -

So in an action of Ass for an escape, the confessions of the party escaping, that he owed plff the debt for wh. he was committed, is void of that fact as plff. (R. 65. 4 J. R. 436. vid title Ass 20.) for the confession wd have been good technical as himself if indebtedness, and by the escape the Ass becomes liable for the debt, and plff ought not to be deprived of the benefit of such void. by Ass's wrong. -

So in an action vs. Huff for a false return, an acknowledgment of indebtedness by the original debt is
void (Pr. 55. 1 Exp. 189. n. 15. R. 430.) And if in the case of escape above stated, the escape was
suffered by an under Huff, his confession of the fact of an escape (it had been hidden) wd be void
vs. Huff. (Pr. 17. 18. Swift 128. 1d Ray 90.) The reason is that as the breach of official duty by
the under Huff are deemed those of the Huff, he may be said, so far as respects civil liability, to
represent him. But by the latest authority, the void is limited to declarations made by
the deputy at the time of the transaction in question (Ph. 76. 1 Corp. 396. n. 387. Pr. 65. 10 Johns 478.)

In an action by the assignees of a bankrupt, the latter's acknowledgments before
the act of Bankruptcy, of the petitioning creditor's debt, is good evd. in support of the com-
mission of Bankruptcy (1 Exp. 158. Pr. 2:58) for they represent the Bankrupt, & as
his confession wd have been good evidence on wh. to obtain the commissⁿ of himself, it
is good in support of the commissⁿ, when they are under it (2 Bl. 279.)

Upon the same principle on a sci. fac. vs. a garnishee, he may prove the acknowledg-
ment of the absconding debtor that the garnishee owed him nothing (Swift. ev. 128.)

So where a party to a suit claims a justified by virtue of an other's title, the latter's declⁿ
as to the title are void w^h him: as if A justifies in Trespass under the title b^y order of B. (dⁿ 129.)
for B's confessⁿ is good to disprove his own right, & that is the right in question.

24.

General Rule. - When there are several debts, the confession of one will be void vs.
himself only, not vs. the others. (Swift. 128. 132. Kelb. 13. 1 McC. 40. 247. Barnes 317. Bull. 243.)
Hence in an action vs. one person (as one of two joint & several debtors) the confession of the
of the other is not admissible to prove the contract, or the promise, or the execution of the
instrument (Kirby 62. 194. 203.) for that would enable one person to subject a stranger, for
his sole debt, or where there is no debt. - But there is an exception to the rule in case of partners.

If one partner is sued for a company debt, the confession of the other is void vs. him (Pr.
cases 16. 203. Chy. Bills 209. 6th ev. st. Ph. 72. 3. 11 East 589. 1 Taunt. 104. 1 Exp. 189.) for the part-
nership being established, each is an agent for both. (Post 65. Ass. 51.) So too the admission
is after the determination of the partnership, and by a partner not sued (Ph. 73. 1 Taunt. 104.)

Contra 3 Johns 536. Doug. 629.)

And tho' the confession of one of two joint ~~tenants~~ several debtors, not being partners, is

not avail in an action *vs* the other to prove the contract, yet the court being established, such confession may be proved to take the case out of the shot of limitation, as for any other purpose in law (Doug 674. 652. b. 654. P. Cas 15. 203. Ph 72. 3. 3 Doug 307. 9. 10 Hunt 104.) for in this case, the contract being established, they are *quoad hoc* in nature of partnership - besides the confession in legal effect, is not strictly in the nature of a legal declaration, at least it is not admitted as such; but as a fact or an act which in itself has the effect of a new promise - the act of one being virtually the act of both.

But this rule is not predicable of prosecution for crimes or trespasses. In these cases the confessions of one deft are not sufft to prove another a trespasser: tho in case of illegal combination (the comb being established) the declar^{ns} of one, made at the time of doing the illegal act, as to the motives and designs of the party, are avail not only *vs* himself, but the others also. (Ph 704. 6 T. R. 527.) they being part of the *res gestae*.

Scias of the declarations of one at a diff't time (2 Day 205. Ph. 74.) -

If one of two defts suffers a default, and the other pleads the issue, the declaration of the former may be proved on the trial of the issue - for the purpose of shewing the amount of damages: - for the verdict establishes a joint liability, & must ascertain the damages *vs* both; so that as to that point both are on trial (2 Day 133. Swift 128. Post 121.) and if both are subjected, there can be regularly but one assignment of damages. -

In criminal cases also, the confession of deft out of court & before a Magistrate, is avail *vs* himself (Holt 18. 2 Hawk 644. 7. 1 McC. N. 42. 361. Leach 287. 319. Pe 19. 2 Swift 393. Ph 77. 81. and it seems now settled, that proof of his confession, uncorroborated by any other *testis* may warrant the jury in finding him guilty. Tho in capital cases, it was formerly holden not sufft. (1 McC. N. 57. 273. Post 27. 743. Leach 314. Sug. 20. 131.)

But a confession extorted by torture or threats or induced by promises of pardon or a favor, is not admissible (Pe 19. 20. 1. McC. N. 42. 44. Sug. 20. 131. 2 Hawk 244. 11. Leach 122. 6. 248. (Holt 18. Carter) Post 103.) and hence confession made in expectation of being admitted a witness for the public, is not evidence (Leach 136. Swift 132.)

But a discovery of material facts resulting from a confession even thus ob- 26

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tained a good evidence & good wit. viz. a thief (under threats or promises) confesses the theft, and informs where the goods are concealed, and they are found at the place mentioned: here, tho' this confession of guilt is no wit. the information as to the place of concealment, and the fact of finding are wit. - no danger of his confession being in this respect false (Pr. 20. Leach 299. 301. Mc N. 47. 8. Lev 132.) this proves his knowledge of the concealment and is presumptive wit as him. -

On Eng? the examination of a person before a magistrate and taken in writing is wit as him in case of felony, under the stat of 182. Phil & Bayl (2 Hawk 644. 5. 1 Mc N. 37. 9. 284. 362.) there is no such stat in Conn. (Hazardous. 2. 5.)

A distinction exists between confessions of a party and offers of compromise - the latter are not wit in any case "for a man must be permitted to buy his own peace". Besides they prove nothing (Pr. 18. 1 Esp 143. Swift 20. 126. Ely 13. 203. Phyl. 9. Bull 236.)

27. But confessions of fact during a treaty for a compromise, are wit as the party making them (Pr. 9. 1 Esp. 143. 2 it 475. 3 it 113. Bull 236. Pr. c. 6. Ph. 79) Lu. has not Supr. Court of Conn. adopted the contrary rule?

The acts of a party amount in some cases to an admission wh. is conclusive upon him: Thus if one act as an inn keeper, and is sued & prosecuted as such, he cannot deny that he was lawfully an inn keeper. (Pr 20. 3 T. R. 638. n. 637. Sw. 129. for as he had as himself out in that character, to avail himself of the benefit of it he cannot avoid its duties; otherwise individuals & the public might be defrauded.)

28. So if a man lives with a woman as his wife, when she is not so, she may bind him by her contracts, as a lawful wife might do (Pr. 20. 2 Esp. 637. Swift 129.)

And in some cases if a man treats with another, holding a particular situation, and thus derives a benefit to himself, he is not permitted afterwards to dispute the facts. - viz. A rented Globe land of B the incumbent, in an action for use and occupation. A was not allowed to dispute B's title by proof of Timony (Peck 21. 5 T. R. 4. 3 it 632. 4 it 700.) So if Mortgagee lease the land, the lessee cannot deny his title in Grotby by proving the Mortgage. - (1 T. R. 760 n.)

Presumptive Evidence is an inference from certain facts proved or admitted, of the existence of some other fact or facts (Swift 136.) Evid. wh. may be true, consistently with the non-existence of the fact wh. it conduces to prove, is presumptive as contradistinguished from direct evid. e.g. if stolen goods are found in the possession of one who is not the owner the fact is presumptive evid. that he is the thief. - (Swift 136. 1 Mass. R. 6.) But such presumptions may be rebutted. (Pr. 20. 21.)

Long, undisputed, adverse enjoyment of any incorporeal right, franchise or easement affords a presumption that it had a legal foundation; and in such case even recents may be presumed. The fact to be presumed, is submitted under the direction of the Court to the Jury (Pr. 21. 22. 12 Co. 5. 2 Selw 1091. Corp 103. 216. 1 T. R. 377. 6 East 208. Swift 138. Esp. d. 636. 3 Mass. R. 399. 2 Conn. R. Aug. 534. Hutch. 2 Saund 175m. 1 Camp 465. 1 Burr 400 2 Ch. 206. 4 Day 244. 3 Mass 136. 3 Cases 309.) See Lu. de hoc. -

This rule is founded on the principle of quieting possession or enjoyment of long standing (Corp 215 P. 22.) When the subject is not within the stat. of limitations, it is in analogy to that stat. (Corp 102. 3 T. R. 157. 2 Burr 1088.) Thus deeds of land, rate bills, adverse titles &c have been presumed after long and quiet possession accompanied with other circumstances, rendering it probable that such a deed or once existed. (3 Mass 399. 2 Conn. R. 609.) Thus an undisputed, adverse possession or any enjoyment of any franchise or incorporeal thing, for 20 years in Eng. or 15 in Conn. may in analogy to that of limitations be left to the Jury, as a ground of presumption (Esp. 636. 6 East 208. 2 Saund 175m. 2 Conn. R. 584. 1 Camp 265. 1 Bos & P. 400. 2 Day 444.) and of late the presumption has been holden as conclusive - and if so, Juries are not at liberty to find overt. -

But more length of poss. is no ground of presuming title to lands or tenements; as these are subjects to wh. the stat. of limitations extend: a contrary rule might repeat every saving in the stat. (2 Day 523. 2 Conn. 617.) as to incorporeal subjects. -

In case of a bond wh. has lain (18a.) 20 years dormant without suit or interest paid, payment will be presumed, unless obligee can assign a good reason for the delay (Pr. 24. Swift 138. 1 Bl. R. 532. 3 P. W. 377. 5. 3 Mod 278. 3 R. p. ch. 835.

The party must have acquired in the relation, that he has the power to admit it. - S. G. -

Burr 434. 1963. 15 R. 270. So after 16 years, (there being other circumstances to fortify 170
the presumption) the question has been left to the jury (Exp 226. 44 pt. St 562.)

After such a lapse of time, the "onus probandi" (as payment within the time) is upon plff. (St 2, pt 103.)
Secus if he can account for the delay, as by the smallness of the demand, or perhaps by absence,
instability &c. - or that part of the time plff was an alien enemy (Pr 24. Corp 214. Exp 226.
2 Post 64. 2 Leach 174.) or if he can prove a recognition of the debt within the time, as
by payment of interest &c. (Pr 24 n. St 826. Ld Ray 1370.) In such cases the presump-
tion does not arise, and it may be rebutted by an ineffectual suit within 20 yrs. (15 R 371. Exp 227.)

And an indorsement (if part payment) by the creditor if made before the time when the
presumption would have arisen, is good evidence of such payment (Pr 24 n. 2 St 826. Ld Ray
1370. 3 Br. p. c. 535. Exp 226. 7.) Secus if made after that time (Pr 25 St 827.)

31. But if debt relying upon that presumption, pleads "solut ad diem" only, the plea
is taken strictly; so that if plff on that plea can prove a part payment, after that
day, (the ^{twenty} ~~strictly~~ years ago) the plea is fulfilled and plff entitled to judgment. (Exp-
226. 2 pt 63. St 562.) hence the usual plea now is "solut ad diem and solut post diem"

If a creditor entitled to a debt payable in instalments, gives a receipt for one in-
stalment, it furnishes a strong presumption, that the preceding instalments, have been or
are paid - So of rents - (Pr 24. 3 Bl 371. Corp 103. 15 R 399.) but it may be rebutted. -
If debt relies upon lapse of time alone, it must be full 20 years: if it be less than that, the
presumption will not arise without other circumstances concurring. Exp 226. 15 R 270.

In Com. actions on bond and notes for money only, are barred in 17 years by 1 Stat. Anne 10
and mere length of time short of the period prescribed in the stat of limitation (in cases
to wh the stat extends) is not suff ground for presuming the extinguishment of a
right (Corp 214. Pr 24 n. 4 q. delay in collecting or demanding a debt, by note or
bond in Com. for any period short of 17 years. -

And length of possⁿ alone is not a ground for presuming title to land. The stat of
limitations has made all necessary provisions on that subject: such a presumption
if allowed would defeat all the savings of the stat. But it is void. connected with other
grounds of presumption (2 Bay 523. 2 Com R. 507) When a party relies upon an actual

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conveyance of title, if some part of the void is wanting - i.e. it may constitute one item in circumstantial void of an actual conveyance, and even a short possession in such cases is evidence among other circumstances. - Aliter, when length of possession is alone relied on as presumptive bar; a conclusive void, arising from mere length of possession, ^{which} is predicable only of subjects not embraced by Stat. of limitations (2 Conn. R. 107 & one of these classes, 52 of cases, I said to have been reversed by Sup. Ct. U. S. Feb. 1822.) Qu. whether the principle of the case last cited has been reversed?

Evidence is of two kinds, first written, second unwritten, or parol.

Written evidence is of three kinds - first Records. Second Public writings or documents
wh. are not records. Third Probate writings. -

Records

A Record is a written memorial of the Law of the State, and of the precedents of Justice according to the laws and customs of the State - c. Gill 48. Bull 235. R. 52. Post 63. Hence the written memorials of the acts of the Legislature, and of the Judgments and proceedings of courts of record, are denominated records (R. 26. Gill 7. Sugr. 2. Bull 235. 221.)

A record cannot be contradicted by any writ. for it imports absolute verity (R 27. Bull 222) this rule is founded on the high authority wh. the Law attaches to writings of this nature.

If however a record is made erroneous by any unauthorised alteration, the fact of alteration may be proved by parol evi^d. But evi^d is not admissible to prove that an alteration wh^{ch} renders the record correct was improperly made (1 Bl. R. 664. 4 Bac 226 by R. 28. n. vid 1 St 210.) The court to wh^{ch} it belongs has a right to amend it anew. (partial.)

And doubtless it may be admitted to prove that a writing, importing to be a record, is a mere forgery: for this would not be falsifying or contradicting the contents of a record, but merely denying the writing to be one (Post 70)

So also the fictitious dates of writs issued in vacation, may be contradicted, and the true time of issuing them proved, where it becomes necessary for the purposes of Justice - e.g. Upon the plea of the St. of Lim^{es} or Tender CP 27. 2 Bac & Burr. 950. s. 1241. & being a general rule that all fictions of Law may be contradicted for such purposes.

Records being memorials & precedents of the Law, to which every one has a right of recourse cannot be removed from place to place, for private purposes. Hence their

existence and contents are provable by copy, these being ~~the~~ ^{being} the best secondary evidence (Hillb 20. 3. Pr. 28. Bull 225. 6.) 172

General Rule. When a writing of a public nature is produced, a copy of it duly proved, is evid. (Sugr 22. 3. Hillb 154. Doug 572. Post 70. Pr 91. McT 355.)

The copy of a copy is however no evid. (Hillb 154. post 38. McT 355.)

But public acts of the Legislature require no proof of any kind in the State in which they were passed - for being the Law of the Land, they are supposed to be known: hence they are read from the printed stat book. The book is not however, considered as evid but used merely to aid the memory of the Judges (Pr 26. 7. n. Swift 2. Hillb 10. Bull 222. 5.)

35. But private stat not being a branch of the Genl Law of the land, are not supposed to be known to the public or Courts of Justice. hence they are required to be proved as facts like other records which relate to private rights (viz. by copies) (Pr 27. Hillb 12. 3. Day 237. 10. Mod 126. Bull 222. 7) and the private stat book is no evid of private stat^s.[#] for it is no more than a private unauthenticated copy, not verified by oath or any officer's sanction (Pr 27. Bull 225) as to the Stats of neighbouring states (vide page 72.)
- * Note. once holden contra by J. Parker (Hillb 13. and Id Ray 472.)

But if the Legislature declare that a stat in its nature private, shall be deemed public, the stat book is sufficient evid of it, or rather, there is no need of proof: the Judges being bound to take notice of it judicially, as of Genl. Law. (Pr 72. n.) Indeed Courts are bound to consider it as a public stat. In this case it is also unnecessary to plead the stat specially, to introduce it to the notice of the Court. -

36. Records not allowed to be removed, are to be proved by copies substante, these being the best evid, next to the original itself (Pr 28. 96. Sugr 222. ante 244.)

Copies of the records of the Legislature, are to be certified by the Pres^t of the State: those of the records of the Courts of Justice (according to the practice of Courts) by their respective clerks, if the Court has a clerk, if not by the Judge himself (Sugr 22.) The mode is the same, probably in most of the U.S. In both cases the copy is authenticated by seal, if there be one; and our Courts are presumed to know the seals of the Legislatures and Courts of all States. (Sugr 7. Hillb 19. 15 Hillb 6. 7. 7. U.S. 153. Pr 30. 1.)

173. Copies of records under seal are called exemplifications (P. 27. l. 2. 2 Const. Rep. 85. 10 Mod. 125. 6. and by the com. Law seals of public credit are full ev. of themselves, without oath or other authentication (Bill 19. 1 Sid 141. Hardw. 8. 9. Plowd 411.)

So of the public national seal of a foreign country or state (2 Const. Rep. 85. 9. Mod. 66. 4. Dall 416. R. ex 73. 2 Cranch 187.) aliter of the seals of foreign municipal courts (3 East 321. 2 Const. Rep. 90. 5 East 473. 3 Johns 310. R. ex 72. 3. 5) as to the seals of foreign cts of admiralty (vid post 73.) they prove themselves.

By the Law of the U.S. if an exempt² is attested by the clerk of the court, it must, (to be ev. in another State) be accompanied with a certificate of the chief or presiding Justice, or of the Governor, Secretary of State or Chancellor, that the attestation is in due form and by the proper officer (7 Stat. U.S. 173. 153. See ex. 7. post 62.)

By the same Law, copies of records or "office books" kept by a public officer, not appertaining to any court are (for the same purpose) to be attested by the Keeper of the office ^{with respect to his office} (if there be one) together with a certificate, as in the last case, by the presiding Judge of the County, or by the Governor, Secretary of State or Chancellor (7 Stat. U.S. 153.)

Copies of the records of Courts are of four kinds, tho' usually divided into three: viz

1st Exemplification made under the great seal & unknown here (P. 28.)

2nd Exempt under the seal of the court, to which the record belongs (Id.)

3rd Office copies, i.e. copies certified by the attestation of an officer appointed for that purpose (P. 31. Bill 22.) But not under seal (Bill 228. Bill 21. 2.)

4. Sworn copies, or copies compared with the original by a witness, and proved by him on oath (P. 27. Bill 22. post 63.)

* Note. Such copies are themselves records (P. 28. Bill 14. 1 Sid 14. 5. 6. Hard 188. Plowd 442.) And in Eng^d are the only ev. or "real till record" in a Court equal or

inferior to that whose record is in question (P. 27.) In a higher court the original may be attested up by certiorari. (ib.) Exempt² under the great seal being unknown here, those certified under the seal of the court, are of the highest authority in our Law; and being higher than sworn or office copies (Bill 22. R. 27. 30.) are regularly the only ev. when the record is distinctly put in issue by the plea

of "mul till record" in a diff't court from that whose record is in question (Co. 2. vide
Prek 29. 30. Giltb 14. 17. 19. 1 Sid 146.)

8. But if a record in the same court, in wh the issue of "mul till record" is joined, is
denied; the origl itself is to be inspected by the Judge (Pe 29. Swift 62.) it cannot be
submitted to the Jurors, for the issue of "mul till record" must always be tried by, and al-
ways concluded to the Court (Lawes Appr.)

But when a record is only matter of inducement "mul till record" cannot be
pleaded to it - for matter of inducement is not issuable (Bull 230. Swift 2. Giltb 26. 1 Sid
145. b. 4 Bac 68. 71. Lawes 46.) In such case the issue being tried by the Jury
the evd of the existence of the record is to be submitted to them, and a sworn copy,
as well as an exemplification is admissible. ex. gr. the record of an execution; title in
Ejectment. (Bull 230. Pe 29. Co. 2. Giltb 26. 2 East 473.)

But a copy of a sworn copy is not evd, however it may be authenticated: for the first
copy not being produced, is not sworn to in Court, and therefore is not evd; and the second
cannot at most be of higher credit, than the first. (Pe. 29.)

39 Office copies are grantable only by an Officer appointed by Law for that purpose;
a copy thus granted is in itself evd, and is of course received without any collateral
proof, ex. gr. copies certified by town clerks or County clerks &c (post 74. Pe 31. 2. 3.
Giltb 23. Florr 110 b. Bull 229.)

But a copy certified by an officer ^{not} entrusted by Law to certify it, is of no credit,
and of course is not evd. unless examined and sworn to. It may then be evd. as a
sworn copy (Prek 31. bth)

Tho' a record is in genl only provable by a copy of some kind, yet if it can be clearly
proved that a record once existing has been destroyed a loss, inferior evd of its con-
tents are admissible, especially when the record is only inducement. (Pe. 29. Giltb 22. 1 Vent
257. 1 Mod 117. 1 Saik 285. Hardw 323. Bull 223. (post 69. 79) *It makes no diff. D. G.

40. In such cases a copy tho' not exemplified nor sworn to be true is admissible. This
is allowed from the necessity of the case (Giltb 22. 3. 1 Vent 257. 1 Mod 117. Saik 285. Bull 223.)
But this inferior species of evd is regularly admitted in those cases only in wh. ancient

175- records, or those of long standing are lost (Pr 30. Gibb 22.3.17 ant 237. 1 Mod 117. Selk 285) for if a record is lost and its contents can be ascertained, the court will permit one to be made out "de novo" (Pr 30. 2 Barr 723) this rule supposes the record to be in the recoll. of the Ct.

Generally an exemplification or copy of a record, must, to be admissible evidence, be of the whole record: for a detached part may have a construction and effect, quite diff. from the full import of the whole (Gibb 17.23. Bull 227. 9. 3 Supp 173. (part 160))

For & as when the full or Judgment or Record in a civil suit is evidence only for a betwixt the parties, & not to it, and their privies. (Peak 38.64. Bull 232. Ray 720. Hardw 462. 7 T.R. 112. 11 East 624. Carth 225. (Josh 53.69.) for to strangers it is "res inter alios acta" &c

Privy.. Privy exists in the following cases. 1st Privy in blood: as ge. Between ancestors and their. (Co. Litt 352. 3 East 353.) 2^d Privy in estate: as between lessor and lessee: lessor & lessee. Jointenants, Coparceners, (Co Litt 169.2) diff. remainder men by the same deed, particular tenant & Remainder man &c. (Co Litt 353. Bull 233. Gibb 61. Co Litt 267. 10 Co 92. 3 Co 23. Peak 29.30.) 3^d Privy in Law: as between Lord & Tenant (this is sometimes called privy in tenure 4 Co. 124.) Wife & her and tenant per curiam. Husbands her and tenant by divorce (Co Litt 352. 3 East 353.) 4. Privy in Representation, as between testator & exr. Intestate & Adminr (14 Co 234. Some other kinds of privy of minor importance are sometimes mentioned. —

Judgments when void for & as when It is an established rule that a judgment by a court of competent Jurisdiction, directly upon the point in question, is conclusive for & as the parties to it and their privies "Interst respubliis abest finis litium" (2 Vent 169. Amb 461. 1 Ld 238. Pr 34.6. Supp 9. 6 Co 7. 2 Bl. R. 827. Bull 233. Co. El 668. 4 Bac 116.) hence when final judgment has been given in a suit by a court of competent Jurisdiction, it can be impeached or called in question only in due course of Law: as by writ of error, bill in Equity, directly praying relief or it. or in Court by a petition for a new trial or an appeal (Pr 36. 10. 20 9. 10. Henry 24.5.)

It cannot then be impeached in any collateral or original action for a final judgment deciding the right in question, must determine the controversy or litigation would be endless (Pleadg 116.) The rule is the same as to decrees

in Chancery, and awards of arbitrators (Pr 68. 75. 1 Doug 130. 3 ib 30. Sw. 10.)
Thus if Judgment had been given for debt or demurrer to the plea to the action & that
the right has been decided, plaintiff cannot afterwards while the Judgment remains in force
maintain any similar or concurrent action for the same cause. & 44. 91. Trower & Fresh.

Trower & Assby. (Pr. 34. 6. Sw. 10. 11. 3 Mod. 314. 2 Bl. R. 327. 3 East 346. 352. 3.) * Note
This rule is not confined (as it sometimes has been said) to personal actions; but applies
universally to all actions "quoad" these subject matters (3 East 357. 8. Sw. 10. 184.)

In such cases the first Judgment may be pleaded in bar of a second action
for the same cause, by way of Estoppel, or in some cases be given in revid. (1 Exp.
43. 4.) under the Genl issue. & 4. in Assumpsit (Pr 34. 6.) & there only, -

In as to the last clause - Should not a record wh. is to operate as an estoppel
always be pleaded, if it can be? post 50. Readys 18. 9. 116 de.)

Reads, if the right claimed in the second action was not decided in the first; as
if the first action were misconceived, or failed for want of an essential allegation
supplied in the second: for in such case, the right claimed in the second, could
not be decided in the ~~second~~ ^{first} - the grounds disclosed in the two being different;
of course the plaintiff may traverse the averment of the cause of action in the second suit,
if the same as was alleged in the first (Pr 37. 2 Vent 164. Sw. 11. 413 ac 116. 7. Cro 21
667. 8 Rayn. 472. 3 Mod 12. 2 ib 318.)

A Judgment for a plaintiff for the recovery of a debt, or other demand, is conclu-
sive of its existence as vs debt and his representatives; and the rule holds whether
the recovery is by verdict, upon confession, by demurrer or by default (Pr 34. 5
Sw. 10. 9. 1 Day 170. 7 T. R. 269. Bull 232.) hence, debt cannot recover back the
money levied under the Judgment, tho' he may possess the clearest revid that he
paid it before the Judgment: for this would impeach the Judgment collaterally.
(Sw. 10. 10) The same rule holds of decrees in Chy and awards (ib. Pr. 68. 75. 1 Doug
130. 3 ib 30. post 74.) and even if a party being sued, pays the demand, tho' deny-
ing it to be true, he cannot recover it back, tho' no Judgment has been given vs him: it
being paid in a course of legal proceeding. (Assumpsit 4.)

+ Swift has misstaken the import of the counsel for the opinion of the ch. - he has clearly said on record -
the case in 3 East 346. (J. G.)

177 Sed Qu. is this rule within the principle? the case 2 Burr 1009 contra (tho the first judgment was in a Court of ^{no} record) has been much shaken and (seem) is not law (Pr 35 2 H. Bl. 414. 7 T. R 269.)

On the other hand a plff having recover judgment for only part of his demand (when he attempted to prove the whole) is precluded from afterwards recovering the residue in another action. The first judgment being pleaded in bar will be conclusive on him. ex. gr. When the action was to recover a debt compounded of diff't items, and only a part of them recovered (Pr 35. 6. 6 T. R 607. 1 Esp 49. Sw. ex 10. 11) Aliter if in the first action he did not attempt to prove the items sued for in the second (it auct.)

But in the application of the genl rule, that a judgment in an action is conclusive so as to bar another action for the same cause, there is in one respect a diversity to be observed between real & personal actions, viz: that all personal actions being of equal degree a bar of one action of that description, is a bar by way of Estoppel, to every personal action for the same cause or thing. ex. gr. a judgment in Tresp. bars two when they are concurrent. (6 Co 7. 11 Bac 115. Pr 36. 7.)

In Real actions, on the contrary, there are various degrees; some species of them being of a higher nature than others, and all of them of a higher nature than personal actions. Hence a judgment in a personal action is no bar to a real one, tho' relating to the same subject: thus a judgment in Dev. ch. fr. is no bar to a real action, tho' to recover the same close. Nor is a judgment in one species of real actions a bar to another of higher species: but the reason is that the cause of action (viz. the immediate right in demand in the two suits) is not the same (2 Ea. 3 East 258. 7. Sw 184. 11.) Nor in every species of action, the record, so far as respects the immediate subject matter in issue, is conclusive by way of bar to any future litigation (3 East 307. Sw 184.)

Hence if any precise fact (as J. S. dying seized) is distinctly put in issue and found even in a personal action (as Tresp.) the record is conclusive as to that fact, so as to prevent it from being afterwards litigated by the parties or their privies in any species or form of action (3 East 346. 54. 5. 8. 66. Sw. ex 21. 181. 4. 7. 91. contra 11. 12. post 4952.) In such case it is the verdict that constitutes the Estoppel. -

To make a record in a former suit conclusive upon any point a matter of right, it must appear it is said, from the first record, that the same point a right was distinctly in issue in the former suit: as when a p^lff. having been barred in a suit upon a given contract, or for a given trespass. after was sued upon the same contract or for the same trespass. Here the cause of action or claim in the two cases, being admitted to be the ~~same~~ ^{same}, or proved to be so. The first judgment is conclusive as the second action by way of estoppel. in d. ant. ante, p. 43. § 1st after. It is always admissible to shew by extrinsic proof, that the subject in controversy in the two cases is the same or differs. C. Ro. Car 35. Tw. 135. 3 Lev 125. 11 Bac 117. Hence observe this distinction:

— Whether a given point or subject of the same nature was in issue, in the former case, must appear from the former record: but whether the subject in issue in the latter suit, is the same as that in the former may be proved "alim di". e.g. Suppose two bonds or notes of the same tenor and date, sued upon in two successive actions. And to make a bar, it must always appear from the 1st record, that the same will as will support the second suit, was supported the first (3 Mod 308. 3 Johns. 20)

47. But in a suit for performing work unskillfully, the record of a former action in which the def^t had recovered of p^lff for performing the same labour, was holden inadmissible: since it did not appear by the record of the first action (it having been tried on the first issue) that the unskillfulness of the work was set up in defence in the first action (10 Rep. 43. 2 Johns 24. Tw. 25) of course it did not appear from the record, that the point was in issue, as the distinction just laid down requires. —

And a prior judgment between the same parties is conclusive, as well when the point or matter decided by it, comes afterwards incidentally in question, as when it forms the gist of the action or defence in a subsequent suit (Tw. 12. R. 75. C. 11. H. T. 266. Bull 233. 44. 2 Shaw 233) e.g. In Ex parte as questioned arise as to the legitimacy of p^lff, a sentence of the Ecclesiastical court deciding upon the marriage of his parents, is conclusive as to the fact of his marriage. —

So in an action in a policy with a warranty that the ship was neutral: the sentence of the Court of admiralty, condemning her, as enemy's property is

179 conclusion (Bill 244. 3 T.R. 196. 434. 2 East 268. 473. 7 T.R. 523. Doug. 554.)

But a judgment is no evidence in any matter wh. comes in question collaterally in the former suit (supra) Bill 233.44. Hob 53. post 57. & ex. gr. if A shd institute a suit for divorce vs B. for adultery with C & B shd plead marriage with C and the court shd find it, this wd be no void in an action, in wh B's marriage with C might be in dispute (Bill 244.5) for the fact found as to her was introduced only collaterally, for the purpose of deciding the direct question of divorce.

Thus suppose a witness to be proved to be legally infamous in a suit between A & B. the judgment would be no void if that fact in a subsequent suit between the same parties, thus if in Exchequer between A & B. A legitimacy shd be brought into question under the same issue, the judgment in that case wd be no void in a subsequent case, in wh. the question of A's legitimacy shd again arise.

And a judgment of a court only incidentally cognizant upon a point, is no void in another suit between the same parties (Pr 76. Sec. 12.) as when a question of admiralty jurisdiction arises incidentally in a court of Chy as a question of carriage &c in an action upon a policy the judgment is no void of the fact in any other case. For the action on the policy does not directly involve the question of Carriage - that quest. arises incidentally in void (Case sup. Legitimacy in Exch.)

The rule is the same as to any fact merely inferable by argument from a former judgment (Pr 413. 76. Sec 12.) ex. gr. a judgment vs A upon a bond, is no evidence in another case that he was legally capable of binding himself by a contract at the time of giving the bond.

And a prior judgment upon a finding, on the same issue, is in no case 49
conclusive, indeed the judgment itself, strictly speaking is no void at all in another case, unless the cause of action is the same in both cases, even tho' the title out of wh. the right arises is the same (Pr 37. 38.)

Thus a prior judgment (on the same issue) for disturbance a nuisance will not conclude either party in a subsequent action, for the repetition of the injury: the cause of the prior & subsequent action is not the same, tho'

the right or title is (Pick 37.3. Tw. 17.140. Bull 232. 3 rest 365)
 2. in such case however, the verdict in the first action is void in the second, tho' not
 conclusive (Post 51.2.) Gibb 29.30. Bull 232. St 368. 1156. 5 Mod 386. 2. a 142. Carth 799.
 2. 1. 2. 3. The same rule holds in the Eng^l. action of Ejectment, tho' the two actions are

The same rule holds in the Eng^l. action of Ejectment, tho' two actions are brought for the same land: for a ~~new~~ casual ejection as well as a new & ouster may be laid in every successive action (P. R. 37.8. R. 12. L. 23. 86.)

In our Ejectment in wh. there is no fiction, the Judgment in a former action is conclusive, as in other actions, where the subject matter is the same. For here the identity of the cause of action in the two Ejectments may be shown as in other forms of action (Post 57. -)

But if the title or any fact decisive of the question of the right of the verdict case had been distinctly put in issue, and found in the former suit, the verdict might be pleaded by way of estoppel in the latter (ante 46.) 3 East 344. F. b. 8. 66. Sw. w 184. 7. 9.)

There is an important difference to be observed between judgments and verdicts, in relation to their natures, offices, and effects. A *pria* judgment upon the title or point in question is a sentence of Law deciding the right; a verdict is more void of the matter of fact in question, tho' when pleadable & pleaded by way of estoppel it will be conclusive. ¹ 32nd 318.9.360.5. L. v. 24.175-7

* note, the silence of writers upon vid., as to this distinction has caused much confusion. - The office of a verdict then, when pleaded a given vid., is to prove some matter of fact - that of a judgment is not to ascertain facts, but to ascertain the right determined by it, upon facts found by the verdict. -

Hence a *prior* judgment, when available at all, is, as between the parties to it and their privies, always conclusive of the right or title decided by it. (See. w. 7. 12. 13. 16. Pick 34. 57. 1 Doug 170. 1 Lev 235. Amb 756. 61.)

And this rule holds as well when the plea budget is given in writ under the Genl. issue (as it may be in some cases) ^{#I} esp. R. 143.4.5 as when it is specially pleaded (Sw. v 16. Pick 34.6. ante 43.) Pleas. 18.9.) ex. gr. in indebitatus ass't

14. A vs B. to recover back money paid, B. may shew under the bail issue, the record of a former Judgment, recovered of ^B, upon wh. the money was received -

So if Deft had a Judgment in the first action, & P^roff^r sued again for the same cause.

Deft in a Judgment, having paid it, brings ass. to recover back the money, as having been recovered by fraud: here indeed, the verdict in the first action is no estoppel, and not void at all; for it is not a finding of the facts as claimed to exist. #2. (Tho the Judgment is an estoppel - being conclusive of a right of recovery in the first action) Ex contra, Suppose a particular fact, especially traversed & found, as S. S. dying seized in fee: here the verdict (not the Judgment) is conclusive evi^d of that fact between the parties and their privies. This is the distinction to wh. the author probably referred (Sw. ev. 18.) tho he has mistaken it. Hence a prior Judgment (except in a few exempt cases depending upon peculiar reasons to be mentioned hereafter,) can never be made use of in any way, unless the cause of action is in both suits the same (Sw. ev. 176. 3.)

#1. A prior Judgment in some cases may be thus given in void so as to affect third persons: but in such cases I believe it can never be conclusive (Sw. ev. 14. 8 Bost 58. 60.)

#2. Cases of this kind were probably in the writer's contemplation when laying down the rule cited - But the rule as expressed is very incorrect. -

Verdict on the other hand, tho conclusive as between the parties & privies, when pleadable & pleaded by way of estoppel (in some cases when given in void tho not pleaded) may in various other cases be given in void when not conclusive (Plead #68 q. Sw. ev. 16. 17. 190. Bull 232. 3 East 360. 1 Esp. R 43. Pe. 37. q. Gibb 29.) But not unless the point in question came directly in question in the former case. c. 16. ant. ante 47. 8. 51.

In the cases however to wh. this rule applies, the cause of action or immediate subject of demand, is not the same in the two suits (for if it were the same, the Judgment in the former case wd be conclusive in the latter) tho depending upon the same title, or same state of facts (Gibb 29. Bull 232. Sw. ev. 17. 190. 13 East 365.

For verdict may be given in writ co-pleaded as the case may be, when the cause 122
of action is not the same in the two cases: thus if two pieces of land are holden by
one & the same title (as under one deed or devise) a verdict in Ejectment or dis-
seizin as to one piece may be given in writ in a subseq action between the
same parties for the other piece: For the title in both cases is the same, tho
the subject matter is diffb. (Bilt 29. 30. 2. 5. Bull 232. Sw. 17. H. 28. 1157. Carth
79. 181. 5 Mod 586. 2 id 143.)

If the subject matter (or right in demand) were the same in both cases, the
Judgment in the first action of disseizin (or Ejectmentⁱⁿ court) wd be conclusive in
the second (ante 42.) note. Not conclusive in the Eng^l Ejectment on account
of its fictitious structure (ante 49.)

52 So a prior verdict in a suit for a nuisance or disturbance may be given in
writ in a subseq action for a continuance of the nuisance, or a repetition of the
disturbance (Peck 37. 8. 3 East 365. Sw. 190.) But it is not conclusive, for the two
actions are for two distinct injuries, tho arising from the same cause. (ibid.)

The rule is the same as to a verdict in a prior action of Ejectment for the same
land: For in consequence of the fictions employed in the structure of that action,
the identity of the real parties or cause of action, cannot so appear as to form a
bar: because no estoppel can be made to appear from the face of the record.
(Burn 3. 12. Pr. 37. 8. 10 Mod. 1. ante 49. in "Ejectment" 86.) But it may be given in
writ tho the nominal parties in the two actions are diffb. for this purpose the
ct will take notice of the real parties (Bull 232. Bilt 35. Sw. 20. 19. Pr. 40.)

It is stated (sw. 11. 18) that verdicts can be given in writ only as to facts specially
found by them: but this is clearly not law. The true rule is, that a verdict can-
not be pleaded by way of estoppel, except as to facts specially found (ante 46. 49.)
tho judgment may be (43. 44.) But verdicts found upon the legal issue, may
be given in writ in a variety of cases. (at supra) -

53. In General (as before observed) the record in a former civil suit is no evidence (in a subseq
one) of the facts or rights wh. it imports to establish, except as between those who

were parties to it and their privies. This general rule holds both as to verdicts and judgments (Gillb 29. 32. 3. 3 Mod 42. Id Ray 1292. Ree ch 212. 2 Mod 12. R. 28. 64. 3. 76. Sw 14. 18. 20. Bull 232. 3. 242. 1 May 98. antt 42. post 69.)

Third persons then, are not in general bound or affected by the verdict or judgment: for they had no right to controvert or interfere with the proceedings or determination: no right to cross examine, and could have no relief ^{if} the verdict is false, or judgment if erroneous. (ibanch.)

And as the benefit of the rule ought to be mutual (Gillb 33. R. 38. Hardw. 472) third persons on the other hand, cannot in general take advantage of the record even as a party to it (R. 38. Gillb 34. 5. 3 Mod 141. Hardw 472.) In both cases therefore, the objection that the record is "res inter alios acta" is sufficing. - But "that the benefit of the rule must be mutual" is not to be universally true: thus, the one who is privy in estate to a party recovering in ejectment may give the verdict in void in his own favour as the same adverse party, yet the verdict if it had gone the other way wd have been no void ^{as} the privy: 24. gr. If tenant for years recovers in ejectment bid to him by D. S. the reversioner may give the verdict in void as D. S. in an action as himself for the same land: - for D. S. was party to the proceedings in the first action, could examine the witnesses and might claim relief ^{if} a false verdict or erroneous judgment; and on the other hand, if the verdict had been the other way, the reversioner wd have been prejudiced by being dispossessed, and yet the verdict wd not in the latter case have been void as the reversioner, because he was not party to the first action, could not examine the witnesses, or claim relief ^{at} ^{supra}. (Gillb 325. R. 38. 9. Hardw 472 426. Sw. 18. 19. Id Ray 730. Bull 232.)

So if there are several remainders limited by one deed, a verdict for ^{one of} the remainder men is void for another of them as the same adverse party - But a verdict as the first remainder man wd be no void as the second (Bull 232. Hardw 462. R. 39. Sw. 14.) Reason as in the last cases. -

* note. Secur. semit. If the first action had been as tenant for life
 (Ed Ray 730 contra. 2d vid. Gilb 34.5. Bull 232. R. 37.)

But the rule that a record is no void except as between parties & privies, is sub-
 ject to several other exceptions: thus when one person uses for his own benefit the
 name of another as party to a suit, the verdict may be void, tho' not conclusive
 for or as the former, as in the latter case (52) of successive Ejectments for the
 same land brought by one lessor in the names of the diff's Lessees (R. 40.
 Gilb 35. Bull 232. Sw. ro 19.) In such case, the verdict in the first case is void
 for or as the lessor in another suit.

55 To a verdict in Trespass vs A who justifies as Tenant of D.C. is void (tho' not con-
 clusive) in a subsequent action by the same plff vs B justifying as Tenant of D.C. for
 a repetition of the Trespass (R. 40. Doug 577. Sw. 19.) for D.C. in this case
 like the lessor in the last, is virtually tho' not nominally the party in both suits.

There is another exception to the Genl rule, when the point in dis-
 pute is a question of public right: in such cases a verdict finding or disprov-
 ing the right will be void as to that point in a subsequent action between ~~the~~
~~diff's~~ parties. e.g. a verdict finding a public right of way; the right of a city to toll.
 the duty of a parish, town &c to repair a public road, or any custom in law. (R. 40
 Sw. 19. R. R. 156. 219. Gilb 36. Ca. H. 181. 1 East 355. post 69. 113.) Thus in Trespass vs A who
 justifies under a public right of way, a verdict vs him may be given in void. vs B
 in a subsequent action of Trespass vs him where he defended in the same right: and is
 concluded (1 East 355. Sw. ro. 20.)

In no one of the above cases however is the verdict conclusive (see ant. sup.)
 because the parties not being the same there can be no estoppel. The
 principle a ground of the last exception probably is, that as the right in
 question is a public one, every individual is in a degree interested in it, &
 might of course be either benefitted or prejudiced by the final decision.

The sentences of Cts whose proceedings are in rem (as Cts of Admiralty)
 are generally conclusive void for vs all persons whether actual parties or

185-
Sentences of Courts of Foreign Jurisdiction.
not (as to sentence of foreign Ct of Admiralty vid post 40.) for all persons may become parties, and of course are potentially such - Besides a sentence of condemnation acting directly on the subject, it is in the nature of a conveyance a transfer of it like an execution title (Sw. 13. 15. Pr. 46. 48. 9. n. 71. B. n. 8 J. R. 176. 434. 7. 6 434. 523. 681. 2 East 268. 4 Co 29. 2 Bl 977. 1174. 5 J. R. 255. Marshall ins. 288. 92. 328. 614.)

Whenever therefore, any matter determined by such a court, afterwards comes incidentally in question in a civil case in a court of Com. Law, the sentence is conclusive (it auch) ex. gr. Question of neutral property, determined in a prior court, and same question afterwards raised at Com. Law in an action on the underwriters: sentence of the former Ct is conclusive. Note. It must come incidentally in question at Com. Law if at all: as Com. Law Cts have no jurisdiction direct or original, over such subjects. -

The rule it has been held is the same & for the same reason, as to the sentences of Cts having Jurisdiction of the Probate of Wills, the power of granting Administration &c. In these cases as in the former, the sentence granting probate &c is conclusive upon all persons, even on criminal prosecutions (Proby s. n. 1 Lev 235. Sw. 13. 12 Bay 170. 2. 6 312. 37. 82. 125) ex. gr. - Indictment for forging a will: probate of the will in the proper prerogative court was held conclusive. 2^d Stra 481. 703. Leach co. ces 481. and 761. 2.) But this is now denied per Lord Ellenborough in Rex vs G. 1702. (Phillips 247.)

As regards criminal prosecutions (post 58.) Note vid Leach co. ces 103. 2 Mc N 429. contra. - But then the probate was void, the supposed Testator being alive and so no Jurisdiction (3 J. R. 125. and also Mc N. 458.) where probate was obtained by fraud in the proceedings (ib 438. 450. 461.)

In Com. the probate of a will is conclusive, as well in relation to real as personal estate (Sw. 13.) & may be set aside on appeal. -

And in civil the judgment or sentence of the ecclesiastical court in mat or matrimonial cases, as upon questions of marriage, divorce &c, is conclusive

of the same question after ~~was~~ arising (incidentally) in a Court of Com. Law
or Equity, given as to third persons. (Pr. 76. 44. And 75b. 762.3. See 13.) & q.
question of legitimacy in Equity, a prior sentence affirming or annulling the
marriage of the parents is conclusive (Pr. 77. n. & Co. 29. 7541. East 235. Stag 81.)

So in an action of a man, by a creditor of his supposed wife for a debt
owed, while sole; a prior sentence as the marriage is conclusive as the Plff. -
(Pr. 73. n.) The reason of the rule as to third persons in these last cases,
probably is, that as the sentence is in the nature of a proceeding "in rem" it
ought to conclude all persons, tho 3^d persons neither were nor could become parties
to it. - For a diff't determinⁿ even at Com. Law between 3^d persons w'd necessari-
ly impugn the sentence. But a determination at Com. Law of the prevailing
party in a prior Com. Law suit, in favour of a stranger to the prior suit w'd
not impugn the first judgment. Thus if the parents of S. D. are divorced in the
ecclesiastical Court, and S. D. sh^d afterwards recover as heir to his parents, this re-
covery w'd be repugnant to the sentence of divorce. But if A sh^d recover in
disseisin or B. & C sh^d afterwards as A. there w'd be no inconsistency between
the two judgments. Note It is said on the same principle on wh. an estate little
under a judgment as A. is void of title in the Plff in the eyeⁿ of all others, or, on wh
a deed of land from A to B. is void of title in B. as 3^d persons. (part) For the sen-
tence as to what it confers, est^{ab}lishes an annul; it does not like a mere Com.
Law judgment ascertain a right, & award its enforcement, but executes itself. -

Such sentences are not however conclusive as the King or a
public prisoner; as upon an indictment for bigamy. 1st It is said, because the
King et not became party to the proceedings; 2^d Because the fact in question,
cohabitation as a crime, was not cognisable by the ecclesiastical Ct. (Pr. 78.)
But this last reason w'd hold equally in the preceding cases of forgery (Phil 247.)

And in the former cases (56.) individuals, who are strangers to the proceed-
ings, may show that the sentence was obtained by fraud & collusion between the
parties (or any other fraud upon the Court) These being extrinsic facts, & wh^{ch} other
etc

in all the most solemn proceedings: It may be averred even in a collateral suit, that a fact was mislead by fraud - but not that it was mistaken. - (Peeke 76. 8. 12. 117. 121. 261. 271. 246. Amb 762.)

So when a judgment in a former suit forms either the whole or a part of the cause of action or defence in another; the record of it may be given in evidence in the latter: for it is a stranger to a former action (Peeke 61.)

Thus when one has been compelled by suit to pay money to another, & sued for reimbursement, he may give in evidence the record of the recovery of himself: - not indeed for the purpose of proving any of the facts which appear in the first record, or the right which it imports to have established: But for the purpose of showing the single fact that a recovery to such an amount has been had. The record itself in such case is one of the facts which constitute the cause of action: as when a surety has been compelled to pay for his principal - a debt for default of his Deputy: or matter for the injury done by his agent; or an indorser for the acceptance of a Bill (Peeke 238. 240. 14.) In each of these cases, if an action is brought to recover an indemnity of the principal or wrong done, the prior recovery or debt may & must be proved by the record of the first suit: for the prior suit and its consequences, constitute the ground of recovery in the latter one. -

So also, in an action of a Court of Warrant, the Plaintiff may give in evidence the record of the suit by which he was evicted, for the purpose of proving the fact of eviction: But not that the title was in the evictor. (unless the covenant touched in Gill 28. Bull 22. 1 Bull 396. 22. 29. 39. 40. 41. 42.) and if the covenant was touched in the prior suit, the record is conclusive of the whole case. (Vid. Cook Broken.) it auch.

And in an action of warranty of title to a chattel (as a horse) Plaintiff may, for the purpose of proving that he has lost the property, give in evidence a recovery of himself in an action by a stranger for the same chattel (1 John 517. 518. 15.) But not for the purpose of proving that the title was in the stranger. - Note. in the case cited, Plaintiff gave notice of the

prior suit to the Deft., that he might appear & defend the title. See as to the use of? 188

So a former recovery & satisfaction obtained by Plff is a stranger, for the thing a matter in demand, is void to prove the fact that such prior recovery & satisfaction have been had, or in case of Tort, that a prior recovery only has been had (Co. Dec 73.) Ex. gr. former recovery is D. S. for the same Tresp. &c for in the one case the former recovery constitutes a part, and in the other the whole of the defence. -

In these cases also in wh. a party to a suit derives his title from a judgment in a former suit, between himself and a stranger, he may give the prior record in evd. This when in Eject. between A & B. either party claims an execⁿ title under a judgment of his own or D. S. he may shew the judgment in evd. (Dev. 14.) for the record of the prior suit, & the proceeds upon it, are in the nature of a com. assurance, and are therefore admissible upon the same principle, on wh. a deed from D. S. wd be so. But these are not void, that the orig title was in D. S. but only of the fact that, whatever title was origly in him, is now in the party who recovered judgment vs him & recovered the deed from him. -

Whether the verdict in a criminal case, can be used as evd of the fact found by it, in a subseq civil suit, is said to be a point not clearly settled (Prosser 107. n. Phil 87. 8. 4 Burr 2225. 4 East 577. n. 581. 1 Camp. 9. 157.) There has indeed been some contrariety of opinion upon the question: but according to the genl principles of the Law of Evd, & the weight of authority, it seems not to be admissible (Mull 245. R. 41. 8. 1166. 2. n. Dev. 20. Hardw 311. Salk 287. vide 1 Sid 325. Gilb 30. 2.) - The well settled rule admitting the party injured by a public offence (except in the single case of forgery) to testify as the offender, upon a civil prosecution for the same offence, seems decisive that the verdict is not void in a subseq civil suit (Post 107. 10.) If it were he wd not testify. -

But the record in a prior civil or criminal case is void, to shew

as part of the "res gesta" in a subsequent case, that such a case has been tried & decided, tho the suit a prosecu^r was as a diff^t def^t. e.g. on an indictment for perjury, the record of the prior case in wh. the perjury is charged to have been committed, is void for the above purpose (Ball 242. Pr. 118.)

So in an action for malicious prosecution, the record of the former prosecution is void of the fact that there was such a prosecution.

A verdict in a former suit is however, in no case void of the facts found by it, until final judgment has been entered upon it: for till that is done, it cannot appear whether the verdict stands or not (Pr. 49. 50. Sta. 161. Ball 242. Phil 292.) the verdict however, & not the judgment, still furnishes the only proof of the facts found by it. The judgment is necessary only to render the verdict admissible.

But this rule does not apply, when the purpose for wh. a record is offered in evi^d. is meant to prove the fact, that such a former trial has been had. In these cases the postea, in the former suit is alone suff^t, as in the above case of perjury. (Pr. 50. Ball 242.) for in cases of this kind, it is immaterial whether the prior verdict is established, or set aside - it not being offered as evi^d. of the facts found by it.

And a verdict upon an issue out of Chancery, with a decree in pursuance of it, is void if the decree is, for the purpose of establishing the verdict, equivalent to a judgment at law. (Pr. 50. Ball 242. Phil 292.)

As to Writs, when records & when not; when provable only by a copy of record & when by itself vide Gilb 20. 38. 40. Ball 244. Pr. 50.)

The acts & proceedings of Congress, and the records of the Courts of the U. S. are proved as our own Stat^s & records are (Cw 67.) The constitution and Laws of the U. S. being binding on each State, and part of its Laws.

Under the constitution of the U. S. as construed by our C^t (art 4. 21) judgments of the C^t in the neighboring states, are of the same solemnity as our own, i.e. conclusive (Cw 67. 3 Dall 322.) In the neighboring states the decisions have been

somewhat contradictory (2 Dall 302. Mass. R 201. Caines 160. 5 ib. 37. 1st Johns 426. 1 Dall 132. 7. 249. 201.)

But now in N. Y. the rule is much the same, perhaps exactly the same as ours.

(3 Johns 178. 16. n. 9 East 192. 3 Nels 297. 5 East 475ⁿ)

The rule established here, is now adopted by the Sup. Ct of the U. S. (3 Wheat 234.) (7 Branch 481.)

As to the mode of proving the legislative acts, & judicial proceedings of our neighboring states (1st Cain. 457. 8. Sw. v. b. y. Stat U. S. vol 7. p. 151.)

Of Public writings wh. are not records:- These are somewhat of the nature of records, being accounts or memorials preserved at a fixed place, by public authority & for the use the public (Gillb 47. Bull 284. Peck 51.) They also impart or constitute init. in themselves, and are regularly, in point of solemnity, the highest species of writ, records only excepted (Gillb 47.) They are in genl proved, as records sometimes are, by copies examined and sworn to as true (Peck 57. 3. 8. Bull 284. 5. Gillb 47. 56. ante 37. Corp 17. 590. 3 Burr 1137.) *as to the mode of proving copies of records of neighboring states in the U. S. vid ante 36. 7. 2d. U. S. 103. Sw. v. y.

Writings of this description are not called records, because they are not precedents of justice according to the laws & usages of the states (Gillb 48. Bull 235. Pe 52.)

Of this nature are 1.st Journals of the Legislature: Copies of these examined & proved by a witness are rec^d as writ (Pe. 53.) See as to Office copies?

But a more resolution passed by either house of a Legislature as a foundation for their proceedings, is not writ of the fact resolved: e.g. a resolution that a certain publication is a libel, or that a certain plot exists, and ordering a prosecution for the offence, is not writ upon the trial. - (Pe. 53. 4. 1st In. 37.)

2^d. The memorials of proceedings in Ch^l of Ch^l: these are not strictly records of the English Law, because the proceedings are not "precedents &c" But documents "secundum equum et bonum" according to conscience (Gillb 48. Peck 50. 57. Bull 235) With as they are regarded as records, & a writ of error lies to set aside decrees in &c &c

The Bill in Ch^l is now regarded as writ for the purpose of proving the facts that such a bill was filed, or such other facts as may be proved by hearsay writ as pedigree (ante 16) Pe. 12. 54. 7 D. R. 23. n. a. 157.) for the allegations in

the Bill are regarded merely as the statements of the counsel to compel an answer. —
For the old rule see 1 P. 220. Bull 235. Devised 188.)

But an answer in Ch. 2 is void as the party making it: for it is a confession
Gill 50 of the most solemn kind, being made under oath (Pr. 54. Bull 233. 2 Vent 194.^{283.}

It is however but a confession, & of course admissible only when a confession in a diff. form wd be void. Hence an answer for an infant by his guardian is not void as the former in a subseqt suit (Pr. 54. Cuth 79. Bull 237. 2 Vent 192. 3 Mod 287.)

Not is the answer of a trustee void as "estoy qui trust" (Bull 237.)

And how far a woman may be prejudiced by an answer made by herself, whole court, is not fully settled (Pr. 54. 3 P. Wms 225. 35.)

But an answer by one of two partners in a suit as him by A, is void as the
Ch. 2. 207. other partner, even in a suit as him by B. (Pr. 55. Pr. cases 16. 203. Doug 629.)

So a voluntary affidavit⁺, by one jointly interested with another, has been admitted in an action as them both (Pr. 55. Gill 51. 6. 7.) It being the confession of a party to the action, and in interest. (ante 24, ⁺ note. This however is not strictly a writing of a public nature: for the aff^t is ^{not} tri-judicial (Gill 50. 3. Post 67.)

But in Genl. a copy of the whole answer, and not of any particular part only, must be exhibited, as the case of Chidputh be. and indeed of all written instruments, & of confessions (Pr. 55. 34. 5 Mod 10. Bull 227. 37. 2 Vent 194. 288.)
Gill 50

And the party who made the answer is entitled to make a second
1 Gill 48. answer, put in upon exceptions to the first, & in explanatory of the first (Pr. 55.)

As the party whose answer is produced in void in a subseqt suit, is concluded by the admissions contained in it of himself; so on the other hand, the averments made in it in his own favour are void for him. (Pr. 55. 6. Gill 50. 2 Vent 194. 288.) =
the oppo^{te} party, however, is not concluded by the latter; but is at liberty to contradict them by other evi^d: or to infer from circumstances or presumptions that they are not entitled to credit (Pr. 56. 7.)

In one instance part of the answer may be read without the residue;

viz. to show that one offered as witness is interested in the event of the suit. *Prind*, the 192
very attempt to exclude him not to introduce his testimony given in the answer (*Pr* 37. *Bull* 288.)

An affidavit by one of the parties wh. has been used in a cause, is of a nature
similar to that of an answer & probably in the same way, viz. by copy (*Pr* 57. 8.)

But a voluntary affidavit, being of a private nature, cannot be thus pro-
ved; the origl must be produced, as in the case of other private writings (as deeds) &
must be proved to have been sworn. e.g. an aff^t by vendor that the estate
sold is incumbered (*Pr* 57. *Gill* 51. 5. 6. 1 *Vent* 53. 413. *Ld Ray* 341. 734. 393. 936.)

Depositions used in a former suit are also void, as between the same parties
on a subsequent trial; if the deponent is dead, is not to be found; otherwise they are
not in general admissible, not being the best evid. - (*Pr* 58. 9. *Gill* 61. *Barnard* B. R. 288.
8. *Salk* 273. 81. 6. 4 *Moo* 116. 1 *Atk* 445. *Bull* 239. 1 *McC* 14. 283. 5. 7. ante 19. post 138.)

They have been said however, to be admissible, when the deponent being sufficient
and falls sick on his way to court (*Gill* 60. 1 *Moo* 283. 4. *Sta* 920. *Bull* 239.) sed. qd.
whether this is any more than a ground for postponing the trial (*Pr* 58. 10.)

But the deposition of a witness like any other written or even verbal declara-
tion of his, may be introduced to contradict his testimony: here the deposition is not
used however, as evid in chief, viz. of the facts stated in it; but to invalidate the
testimony of the witness (*Pr* 58. 9. Post 102.) 2d. Whether the deposition of a wit-
ness who at the time is disinterested, but who afterwards by operation of law, becomes
interested & a party, can be read as evid & the opinions are not agreed; e.g. by
becoming heir, or ex^r or admin^r to a party in the origl suit. (*Pr* 58. 9. *Salk* 288. *Stor*.
Bull 286. *Exp* 766. 2 *Ven* 699. 2 *Ves* 42. 2 *Atk* 2615. 1 *P. W.* 233. 9. in favour of it.)

Depositions to perpetuate the testimony (a *de bene esse*) may be taken under
the direction of Chanc^y on a bill for that purpose, when witnesses reside abroad or
are about leaving the country; or in apparent danger of death. In the two last cases
the deposition is not void till the contemplated event happens (*Pr* 60. 1. *Bull* 240.
Hard 315. 3 *Bol* 303. *Salk* 691. Post 156. *Sw* 114. 5.) *And see* Ch^y 32 -

67. In com. the Sup^r Ct as well as of Eq^y is empowered to take depositions of this kind

173 upon a bill for that purpose. The usual notice is given to the adverse party, and the disposition taken by a commission appointed for that purpose by the Ct. (See 20. 115.)

But depositions (like verdicts ante 53.) are regularly void, only as between the parties in the *pria* suit or controversy in which they were taken, & their privies (See 20. Bill 239. Gilb 61. Hurd 472. 1. Stk. 445. 5th 415. 501. 2. 24. 3 Bac 314.)

To introduce any interlocutory proceedings of a Ct of Ch. 2 in evidence, proof of the *pria* stage of the suit is necessary: thus to make the answer admissible, the bill must regularly be proved, & so of the subject proceedings. - (Gilb 55. 6. Pr. 66.) for it cannot otherwise appear that the answer was made in a regular course of judicial proceedings.

But if the bill has been lost or destroyed, it may be proved like ~~other~~ documents in such cases, by secondary evidence. (Pr. 67. 29. 5 Mod 211. Gilb 22. Bill 238. 1 Vent 237.)

A decree in Ch. 2 is void, whereas a judgment at Law ~~is~~ to be so: the same rules and exceptions apply regularly to both. Thus it is void in *gent.* as between the parties to it and their privies. Rem when the question decided by it is of a public nature (Pr. 68. 38. 40. 64. Long 222. Bill 232. Gilb 29. 32. 3. 6.)

The proceedings in Cts of admiralty (and in Eng^l) of ecclesiastical courts, are void of the same nature and authority as those in Equity. This rule supposes the Ct to have had jurisdiction of the subject matter (Gilb 67.) Pr 69. Gilb 67. 70. 1.) as, gr. probate of a will - sentence in a matrimonial cause, or cause of prize. (Gilb 67. 2. Mod 234. 1 Vent 53. Hurd 108. 40. R. 258. 3d 125. 1 Sid 359. Ray 405. 1 Roll 672.)

In these cases the judgment or decree is as conclusive as a judgment at Com Law, tho it is allowable to shew that the seal of the Ct, or rather proceedings are forged: Ray 405 for this does not control the sentence, but shews that none exists. - (Pr. 69. 1. Sid 359.)

(These proceedings are ^{public} ~~promissory~~ equies as other public writings are.) Gilb 71. 2. 2. 22. 3 Salk 154. Long 672. ante 34. -) They are proveable by copies as other public writings are. (ib ant)

As to the proceedings of inferior Cts in Eng^l, their effects, their mode of proof &c Foreign vid Pr 74. 5. Com. D. 20. c. 1. 2 Bl. R. 836.

Judgments The judgment of a foreign Ct. is void ~~here~~, either conclusive *a prima facie*, of 71

the right wh. it imports to establish, or of the fact it professes to find. (Pr. 70)
But as to the judgments of foreign municipal courts, this distinction is to be observed: if
the party claiming the benefit of the judgment, apply to an Ct to enforce it, it is but
prima facie evi^d of his claim: for as he voluntarily submits it to the jurisdiction & de-
cree of a Ct here, the Ct will examine the merits by enquiring, if necessary, what the
foreign Law is, and whether the judgment is warranted by it. But such a judgment
when used by way of defence to an action here, is as conclusive as a judgment of our
own (Pr. 70. 2 H. Bl. 410. Doug. 11.)

Such a judgment may be proved 1st. by an exemplification under the national
seal; the seal of one nation, being, supposed to be known by the Cts of another (9 Mod
66. 2 East 35. Sw. ev. 2. Pr. 78. 2. 3. 2^d by a sworn copy. (2 Cranch 187. Sw. 8. ante
37. 63. Headg. 63. 5 East 433. Phil. ev. 361. n. ante 361.) 3^d by the attestation of the
proper officer of the Ct. But in this case the seal must be proved, as any other matter
of fact: for the seal of a foreign municipal Ct, is not supposed to be known here, (Pr. 72. 3.
3 East 321. Sw. ev. 7. 8. Gilb. 20. Phil. ev. 361. 361.) as is that of Ct of public Law. -

Foreign Statutes, Edicts, &c may be proved by copies under the national seal
or by sworn copies (2 Cranch 187. Sw. ev. 9.)

By a stat of Coun, the printed stat^s of the several states of the Union, transmitted by
their several Executives or Legislatures to the Gov^r of this state, deposited by him in
the office of the State, & exemplified by the latter seal, are admissible in evi^d.

At. Coun
457. 8.
ante 361. 62

Unwritten foreign Laws & customs cannot be proved by com. parat evi^d. (3 Rep 58)
But the testimony of respectable intelligent persons of the foreign country is proper evi^d.
(1 Johns 385. 396. 1 P. Wms 436. Sw. ev. 9.) Ev. is any evi^d proper except that of professed men?

Unwritten local Laws of these several states are often certified without oath by profess-
ional Gentlemen (2u.) of neighboring states. -

The sentences & proceedings of foreign Cts of admiralty upon subject within their juris-
diction are conclusive of the rights of facts wh. they import to establish (Pr. 70. 1. 8
5. R 192. 230. Sw. ev. 7. 8.) - for as their Cts decide by the Law of nations, wh. is a part of
the Law of every civilized state, their judgments are not regarded as the sentences of foreign Law.

195 And if they state — the void on wh. they find a fact, no court here can enquire whether that void was sufft to warrant the finding. In this case however, the adjudication is not only of the fact found by way of conclusion (as that the property was an enemy's) but of the particular facts stated in the void. (Pr. 71. a.) The latter appears in substance only by way of recital. — (ParR 71)

If such a ct passes a sentence or makes an adjudication without assigning any cause it is conclusive (Pr. 71. ParR 413.) e.g. condemnation of a ship, because visited a spoken on her voyage by an enemy, as lawful prize, that she was not neutral. 73.

But if it appears from the facts and the conclusion founded upon them, that the condemnation was not for any breach of the Law of nations, but for a non-compliance with some arbitrary municipal regulation of the foreign state, the sentence is void, and of course no void shall (Pr. 71. 2. ParR 415. 7. J.R. 523. 8. 434. 562.) e.g. Condemnation of a ship because visited a spoken on her voyage by an enemy.

And no admiralty has any effect by way of void or otherwise, unless the ct wh. rendered it was one regularly established according to the Law of nations (Pr. 72. 3. J.R. 268. 2 East 473.) e.g. French consular cts established by Buonaparte in Spain &c. not recognized by the Law of nations, are not recognized in other states. —

Proceeds in cts of Admiralty are proveable by copies under the seal of the ct. This seal proves itself: — for as the ct acts under the Law of nations, all cts are supposed to know the seal (Pr. 72. 3) The public seals of our own country prove themselves private seals do not, as the seals of individuals, corporations &c. — towns.

So of a seal of a foreign embassy public; this office being established by public Law. (Pr. 74. m. 4. r. v. 8. 10 mod 66. 2 Roll Rep 348. Pills of Recp. w.) This seal & attestation, is the usual medium thro wh. the facts verified by oath, or certified in some case officially by himself, are proved in all foreign tribunals. —

An award upon a submission to an arbitrator is as conclusive as the judgment of a ct established by Law. (Pr. 75. 4. r. v. 10. Wils 38.) for an award is in the nature of a judgment cause 43. And altho an arbitrator cannot actually transfer real estate by his award, yet he can order it to be done, and his determination upon

the points of title, will be conclusive in Ejectment (Pr. 75. 3. East 15. ante 44.)

A protest by a ship captain is not evd. in chief, i.e. not evd. of the facts it states in relation upon policy. But it may be read for the purpose of contradicting the testimony of the person who made it (2 Esp. 490. 670. Sw. ev. 123. Doug 96. 91. Marsh. 816.)

Sworn copies of regular entries in the books of the executive officers of Government are admissible as evd. ex. gr. of entries in the books of the Treasurer or comptroller of the state, or U. S. Ac. (Sw. ev. 223.) are not office copies also?

5 Same rule holds as to the rules of proceedings in corporations entered in the books, ex. gr. of Banks, Insurance Comp. &c (Sw. ev. 23. 2 Mc N. 478. Rgo. 1 Stra 73. 307. Doug 593.) But when a document is in its nature private, tho' belonging to a public body, the origl must regularly be produced (ex. gr.) a letter belonging to a corporation (Pr. 90. 1. Stra 481.)

But the declarations ^{of an individual} of a corporation as such, are no evd. for or vs the corporation (Sw. ev. 23.) for corporations act & speak only by their organs. (ib.)

A Gazette, published under the sanction & control of Government is sufft evd. of an act of the state (Pr 77. 8. Sw. ev. 23. 5 T. R. 436. Bull 226. 2 Mc N. 479.) as of embargoes, blockades, regulations of trade, declaration of war. — So of proclamations of Government and addresses of the people to the executive or legislature (Pr. 77. 5 T. R. 436. Bull 226.)

The register of the navy office is evd. of the death of a seaman (Pr 79. Sw. ev. 23. 2 Mc N. 475.) The books of a public prison are evd. to shew the time of a prisoners discharge &c. (Pr. 79. 3 Boss 158.) So of the log book of a man of war, to prove the time of sailing, with convoy (1 Esp 427. Pr 79. Sw. ev. 23.) or other facts of that nature. —

A Gent history it seems, is evd. of such past events & facts of public nature, as admit of no other proof: but it is no evd. of matters of private concern, as of a particular custom (Pr 79. 33. Selk 281. 12 Mod 85. 1 Vent 149. Skinner 116. Bull 248. Sw. ev. 23.)

Surveys & inquiries taken by the authority of the Government are evd. between individuals, tho' not named in them; as Doomsday books, in Eng^d surveys of ports &c. (Pr. 84. Hob 188. Gill 78. 1 Burr 146. Pr. cas. 182. 1 Wils 170. Taft 24.)

Such public acts being entitled to a high degree of credit. —

Views of private inquisitions, as one taken by a Juff to ascertain the ownership of goods seized on exccⁿ. This is no writ in an action but is given by a third person claiming the goods (Pr. 85. 2 H. Bl 437, 1 Sta 68. vid Stifford & exccⁿ. -

In Eng^l Parish registers, or sworn copies of them, are writ of birth, marriages & deaths (Pr. 86. Sec. 23. Sta 1073.) In Court Town registers, a rather copies of them are writ of birth & marriages, and a certificate from a clergyman or magistrate is writ of marriage. -

Ancient maps tho' made without public authority are writ. when they have accompanied the possession, and agree with the boundaries adjusted in ancient purchases (Pr. 89. Bill 87. 123 Reg⁷ 34. Sta 95. Pr. cases 18.)

The records or proceedings of Ct of chstee are open to the inspection of all persons interested in them (Pr. 92. 17th 297. 2 Sta 1242. Hard 128. Sec 24.)

Copies from the books of public offices, are also dem^ondable by all persons interested, unless public policy requires that their contents sh^d be kept secret (Pr. 92. 2 R. 616. Sta 304.

And if an inspection of such books is refused when applied for by a party to a suit, who has occasion to examine them, the Ct will by a rule, grant him leave to inspect them; or in other words, order the officer refusing to permit an inspection, so far as relates to the point in dispute (Pr. 92. 5. 17th 244. Sta 304. 1008^{123.42-} 788

The books & papers of a corporation are also opened to be inspected by all its members, & in a suit between two individual corporators, or between a corporation and one of its members, an inspection may be ordered by a rule of the Ct. (3 D. R 590. Pr. 92. Sec. 24. 3 M. 39.) But this cannot now be done in a Ct of Law, in favor of a stranger, even in a suit between himself and a corporation, tho' in some few instances it has been done (3 D. R 590. 1st 689. 3d 303. 579. 1 H. Bl 244. M. 393. 2 H. 62. to wh. the other party has no title. -

A Ct of Eq^{ty} however, upon a bill for discovery may in its discretion order an inspection of corporation books, in favor of a stranger, ^{being} _{it} within the province of that Ct to compel discoveries. Sec 24. 5. 3 D. R 592.)

This is upon the same principle as that of compelling an individual to make discovery under a - 198.
But in criminal prosecutions as a corporation any of its members, no act of justice
can order an inspection of the books of a corporation "homo sese accusare tenetur" (Pr.
94.5. Su 35. 2 Sta 1210. 1 Mac 239. 1 Bl 37.) This rule however does not apply to an
information in the nature of a "quo warranto", this criminal in form - for it is
in effect a civil proceeding. Hence if it is prosecuted by a member of a corporation
an inspection of the corporation books may be ordered (Pr 95. 3 T.R. 574.)

When a fact is to be proved or other private instrument, the orig^l of its existence. Proof of
and in the power of the party by whom the fact is to be proved, must regularly be {Privated
produced (Pr 96.7. 10 Co 2.3. Will 93. Post 131. 49. Ante 8.) it being the best evidence.} Writings
And if that is not done, no ev^d can be rec^d of the contents of the instrument (Pr 96.7.) &c

The counterpart of a deed however, can be read in ev^d (Ante 8.) as the
party by whom it was executed & delivered: this not so the other party or a stranger -
see Deed p.7. 4 Cruise. D. 12. Pr. ch 118. 5 T.R. 465. Talk 287. Pr 96.11.)

But if the orig^l instrument is destroyed or casually lost, an examined copy, or an
extract of its contents may be rec^d. This being the best ev^d, that the case admits of.
Pr. 97. 3 T.R. 157. 1 Sta 526. 70. Su 20 30. 1 Camp 193. 4 East 585. ante 39. 87. Pleas 104.

If the instrument is in the possession of the adverse party, & he has had due no-
tice to produce it, secondary ev^d may be given as above, if it be first proved, that
the orig^l was a genuine instrument (Pr. 97. 107. Phil 12. 1 Atk 146. 2 T.R. 201. 2 Boss 37. 237.
Chy. B. 206. 10. 1 Esp 50. Pr & R ev 165.) Note - the rule is the same in civil cases.
2 T.R. 201. Leach 272. 1 McC N. 246.) -

c. So of a letter; whether if no notice had been given: but the fact of a previous
written notice, may be proved without a subsequent notice to produce the orig^l. -
Pr. 168. Su 323. 2 Boss 39.) Notice to the Atty of the party is as effectual as no-
tice to himself (Phil 12. 2 T.R. 203. n. 3. to 326.)

If the orig^l is in the hands of a third person, he sh^d be served with a "subpoena duces
tecum" and if after service he delivered it to the adverse party, secondary ev^d may
be introduced (Pr 97. id. sup. 38.7. Post 157.)

199. If there is a subscribing witness to the instrument offered in ev^d, he must regularly
the cases cited ante p. be called to prove the ex^{ec}^{te} of it, if alive and in a situation to be examined -
This being the best & highest ev^d of the fact. - ante p. R. 9. 97. 8. 205. 6. 5. Esp 16.

This rule holds as well when the instrument is offered to prove a collateral point, as
when it forms the ground of action or defence. 4 Esp 239. 208. But if there are
several attesting witnesses the ex^{ec}^{te} may be proved by either of them. Phil 364. 116.

Hence it is settled that even the confession (ant of Ct) of the party or whom the
instrument is offered as ev^d, does not dispense with the necessity of producing the sub-
scribing witness (R 97. 9. 1 Esp. R 89. Doug. 216. Esp. D. 257. Chy B. 208. 2 Bosc 85.

2 John 407. 7 J. R. 207. 4 Esp 239) But it has been ruled otherwise in Com & New York. (Sur 29)

The Eng^l rule is adhered to in the Eng^l Ct, even tho' the orig^l instrument
is lost, or destroyed, if the subscribing witness is known. - In such cases there fore
secondary ev^d is not admissible, unless the nonproduction of the subscribing
witness is accounted for; as by death, absence &c (R 98. cas 30. appx 39.)

And in Eng^l the confession by the def^t in an answer in Chy, is inad-
missible, unless suff^t reason is shown for not producing the subscribing witness -
(R. 98. 9. n. 4 East 53. Sur 205. 6. Post 85.)

But when def^t has produced a deed before commissioners of a bankrupt
& admitted ex^{ec}^{te} of it, in his deposition it was holden suff^t ev^d in favor of
Plff^s without producing the subscribing witness (R 98. 5. J. R. 366.) It was
in the nature of a Judicial confession. -

So where a party pending a suit, confessed and agreed to admit the ex^{ec}^{te} of a
deed on Trial (R 98. Post 85. 5 Esp Cas. 16. n.) principle same as in former case. -

If there is no subscribing witness, in forma ev^d is suff^t. as proof of the hand
writing of the party (R 98. Com. D. Tait 10. 4. 1 Dec 25. 5 Esp. 16. n. Sur 21.) -

So if a person whose name is subscribed as a witness, denies that he saw the
contra (Cant) ex^{ec}^{te} (R. 98. cas 146. Doug. 216. Ph. 363. 3 Esp 173. 2 Cowp 345. 626. 10 ves 427. 4.

- After his denial proof may be made; as if the deed did not import to be
witnessed. He need not see the ex^{ec}^{te}; suff^t if the party at the time confessed

It requests the witnesses to subscribe (Pr 98. 2 Bask 217. Sw. w 28. —)

Same rule holds when the instrument was rightly and duly attested, tho a name is subscribed as that of an attesting witness. Thus if it appears that a fictitious name has been subscribed as that of a witness by a party executing (Pr 98. 9. Cas 23. 5 Esp 16. Phil 363.) provable as a deed not attested. — And so if the witness attesting is interested at the execⁿ & continues so at the time of trial (5 Esp 16. 1 P. Wms 289. Sta 34. Pr 99. 157. 8. 185. 5 T.R 371. 2 East 182 — ex. gr. if the attesting witness had at the time of attesting given collateral security to obligee or was the wife of one of the parties (Phil 363. Bayard 19. 5 T.R 371.)

So when the person whose name appears as a witness, subscribed without the consent or knowledge of the party, (Phil 363. 3 Camp 232. 4 Taunt 220.) Note see this and in the former case the instrument is in effect as if it did not import to be attested (Pr R. 14. 7.)

So if, after due enquiry nothing can be heard of the witness, so that the party cannot produce him, or prove his hand writing (Phil 364. Bayard 58. 3 Binn 192.) so if at the time of the execⁿ he was legally insane (Phil 364.) In all these cases, the instrument is in effect, as if it did not import to be attested, and may be proved like any other unattested instrument (Pr 147. Phil 363.) ex. gr. By proving the handwriting of the party, or his admission that he executed it, or by the testimony of any person present at the execⁿ (Phil 364. Com. D. w. 13. 3. Pr Cas. 145. 10, 165. 4 B & 4. 1 East 53. 5 Esp 36.)

And proof of the party's hand writing, is sufft ground for presuming the sealing & delivering (Phil 364. Pr Cas 145. 10 B & 474.)

But if the instrument was duly attested, & the witness cannot be examined, his hand writing is the best evd. ex. gr. if the subscribing witness becomes interested after execⁿ by act of law or of the party on whom the proof lies, proof of the handwriting of the witness is sufft. (Phil 362. 2 East 183. 1 P. Wms 289. Sta 34. Pr 157. 8. 185. 5 T.R 271. 2.) In this case the instrument is not considered as in the former as unattested (post 186.) Phil 362. ex. gr. as if he has become blind or lame to either party (3 East 7. post 117. 36. 1 P. Wms 289. 2 Vern 299. Sta 34.) Phil 362.

so if the subscribing witness is dead, or presumed to be so. (12 Abol 607. Phil 362. Pr 100. 7 T.R 285. 1 cloth 230. Esp 257. 2 Atk 47. 1 cloth Cas 280. —

So when he has become blind (12 B & 4 334. 5 Esp 16. Phil 362. for evidence Sw. w. 26. 9 B & 4 381.) —

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So where he has become legally infamous - (2 Fla 333. 5 Esp 16. n. Esp D. 258. Phil 362) or gr. where he has been convicted of treason, felony, the crimen falsi - (as perjury, forgery &c) since the attest^a string of any crime, wh in its nature impeaches his integrity, as conspiracy (Leach 332. 2 Wils 13. 5 Mod 75. Corp 3. McT 206 363 207. 463.)

Doug 93.
Phil. 362.

So if he is abroad, out of the Jurisdiction of the Ct whether domiciled or not 2 East 250. PeaK 100. Esp. D 258. 12 Mod 607. P. Cases 99. 1 Esp. R 1. see 7 T. R. 266.)

2 Corp 282.

So if after diligent search, a known witness cannot be found, the not proved to be abroad (Doug 89. 93. 12 Mod 607. 2 East 183. Ph 362. 7 T. R. 266. 1 Taunt 365.)

Pr. 100

Phil 160. 362.

In all the above cases when the subscribing witness is not in a situation to be examined, proof of his hand writing has been deemed the next best evidence

And if there are several attesting witnesses, none of whom are in a situation to be examined, proof of the hand writing of one will be sufft. (Phil 169. 364.)

And this has been holden sufft with proof of the party's hand writing. (Pr. 99. 100.) tho it has been usual to prove the latter also. - The weight of authority however, seems to be, that proof of the party's hand writing is not necessary. (Pr 101. n. 2 East 183. 250. 4 Johns 461. 1 Bess & P. 360. Phil 363.)

7 T. R. 66.

1. Contra 7 T. R. 266. note C. Doug 89. a 93. 2. Contra 2 Bay 187. 2 ib 255. 3 Bin 192

For in these cases when the witness is not in a situation to be examined by reason of any supervenient cause, the instrument is not (as in the prior cases) considered as unattested. And proof of the hand writing in these cases, is evi^d of every thing 83. appearing upon the face of the instrument, as sealing, delivery (Phil 363. 1 Camp 375.)

du Coum, the practice in the preceding class of cases is to prove the hand writing of the party, where the Law does not require subscribing witnesses; that alone is sufft, tho it generally wd be advisable to prove the hand writing of the subscribing witnesses also (See 27. 8.)

Phil 364. n.
Sta 35.

Where there are several obligors, and the action is vs one only, (there being no attesting witness) the other obligors have been allowed to prove the act^{re}

When in any of the foregoing cases, the secondary evi^d is sd to be sufft the meaning of the proposition is merely that such evi^d is sufft to let in the

instrument as void to the duty; & in other words to render the instrument as void (and sharp) 202

If there are two subscribing witnesses, of whom only one is with in a condition to be examined, the other must regularly be produced (Pr. 101.2. Sec. 20.28.) his examination cannot be dispensed with, by proof of the former's handwriting. —

But if both are in a condition in wh. they cannot be examined, as if one is dead & the other abroad, infamous, insane &c, proof of the handwriting of one, is by the English rule sufft. (1 McC N 310. 1 Bast 360. Sec 28.) Proof is sometimes made however, of the handwriting of both (3 East 250.) —

In all the preceding cases, when there is a subscribing witness who cannot be examined, if the instrument purports to have been sealed and delivered, this is strong evidence for the jury to presume, that these & the necessary formalities were complied with. ex. delivery. &c. (Pr. 99. Sec. 26. Contra Gilb 101. Bull 254.

85 In proving Devises to the validity of wh. three subscribing witnesses are necessary by Stat. if any one of them is in a condition to be examined, he sh^d be produced, and this cannot be dispensed with by proving the handwriting of any or all of them (Pr. 101.2. 37.)

If they are all dead it is necessary to prove their handwriting i.e. the handwriting of all of them & also of the Testator (Pr. 101.2. 37.2. Com L 531. Sta 1109.) —

And in such cases, unless there are strong circumstances to the contrary, a compliance with all the requisites of the Stat will be presumed (Pr. 372. Bull 265 & ib.)

And tho the witnesses are all living, yet the rule of one will be sufft, if he testifies to all the requisites, unless the devise is disputed i.e. contested by contrary evidence (I suppose) in wh. case all the witnesses in a condition to be examined must be called⁺ (Pr. 372. 1 P. Wms 741. 1 Bl. R. 365. 4 Burr 2224. Bull 264. Sec. 881.) * ⁺ Attend see Bull 246. that in this case it is the duty of the heir at Law to call the Attend: see q^{ue} for if so the rule itself appears ungenerous (and also Pr. 8. 372. Contra. —

But Ch² will never decree a devise proved, unless all the witnesses capable of testifying are examined, even tho one is beyond sea — Such probate being conclusive upon all parties (Porr. D. 718. 1 Will 216. 1 W 177. and 14 Devise 195.)

203 Like probate of a will of personal property in a prerogative Court (ante 56.)
Cour. of Probate will declare a devise proved upon the evidence of one of the
witnesses (Sw 27. Devise 196.) As an appeal lies in all cases to Sup^r Ct. -

And tho' any or all of the attesting witnesses deny the execⁿ of a devise, 85
it may be proved by other witnesses (1 Bl. R. 385. Bull 264. 2 Sta 1096. 4 Burr 1225)

When the subscribing witnesses to a deed can't be had, other secondary
evid than his hand writing may be adduced, ex. the confession of a party in
an answer in Ch^l (Sw. 28. 4 East 52. ante 81.)

When a deed offered in evi^d was executed under a power of attorney,
the power must also be produced & proved like any other deed (1 Esp. 90. Sw.
28. 4 East 239. Sug 2 362.) -

In proving the handwriting, the belief of the witness is rec^d as evi^d,
both in civil & criminal cases (Pr 102. 1 Burr 642. Sw 29. -) But this belief
must be founded on a familiar acquaintance with the handwriting of the
party, as having seen him write, or rec^d letters from him in a course of correspon-
dence. Having barely seen writing or signatures, purporting to be his, is not sufft.

126 since 224 Pr 102. 4. 1 Burr 642. 1 Bl. R 384. Pr. App. 11. 12. Sw 29. 4 Esp. 273. Bull 235. 6. -

Having seen the party write his name pending the suit, for the purpose of
showing his mode of signing, is not sufft to let in such evi^d. It wd be making
evi^d for himself. (1 Esp. 14. 15. Ch 9. B. 207. McC 421. 4 Esp. 233. 9. n.)

The witness shd speak solely from the appearance of the writing, without
taking into consideration extrinsic circumstances: as his opinion as to the
party signing such a writing, or the probability of his doing it (Pr. 102. 3. Cas 142)

Evi^d that other ^{writings} ~~writings~~ attested by the same witnesses, were forged by him,
he being dead, is not admissible to counteract the presumption arising from
proof of his handwriting (Pr. 103. n.) Ev. wd not evi^d of his bad character be
good & proper (Pr. 103 n. 125. Post 102. 4 Esp 50 that it wd. -

Comparison of hands is regularly not evi^d (Pr. 104. cas 20. Sw. 289. 30.
1 Esp 357. 4 T. R 497. 4 Esp 273. 26. McC 374. 417. 4 Bl. 358. 1 Bac 644. Bull 236.)

By comparison of hands is meant a comparison made by a Jury between the writing in question, and one wh. is proved or admitted to be the party's, or a similar comparison made by witness who is to testify his opinion from the mere similitude or dissimilarity of the two (Pr 104. 4 Esp. R. 273. ab.) the meaning of the rule is this, an opinion formed from such comparison by a witness, is not evid, and that the Jury have no right to judge from such a comparison made by themselves. —

The above rule as now established, holds as well in civil as in criminal cases. Pr 104. 4 Esp. 37. 117. 144. 373. 6 M^c N. 417. Pe. cas 20. 1 Esp. R. 14. 5. 1 Sid. 413. Trin 573. 12 Mod 72. 2 Ray 40. 2 Esp 7/4. 8 Ves L^r 474.) tho' it was formerly supposed, not to extend to civil cases. Gill 53. McC N 394. 1 Esp 381. Bull 231. Pr. 104. 5.)
* note. But may not a witness skilled in such matters, testify his opinion from the similitude &c. This is done in Court. —

87. In Court. comparison of hands by the Jury has been allowed. 2 Cow 30. 4 Esp 273. 2. n. (Post 107.) But this is not Law now. See Mass Rep 313.

And in Eng^d when the antiquity of a writing renders personal knowledge of a persons handwriting impossible, a witness who had made himself acquainted with the written characters of that person, has been allowed to testify to similitude (Pr 104. Bull 263. 2 Cow 30.) But this was "ex necessitate rei."

And it seems that it is admissible to compare the writing in question with other ancient writings, having the same signature, when the latter have been preserved as authentic documents. — (7 East 382. n. a. 14 East 328.) vide contra per Gates, cited Pr 20. and cases 20. —

And it seems that a person professionally skilled in detecting forgeries, as the clerk for inspecting papers at the Post Office, may testify his opinion from the appearance of a writing, that it is a feigned hand. (Pr 105. 6. 47. R. 427. 4 Esp 145. Contra 2d Kenyon Pr. 103. App^t. 11. 12.

There are cases in wh written instruments may be read without direct proof of their execⁿ. i. e. q. when produced by the adverse party on previous

205 notice for that purpose (ante 79.) *Pr* 108. 9. n. 17. *R* 43. 4. *do*. w. 34. 5 *Exp*. 17. 5 *J.R* 300.
n^d 8 East 548. 2 *Corp* 94. 3 *Tambon* 62. 17 *Johns* 158. To holden in one case when
the adverse party was not party to the instrument produced. *Contra* 8 East 548. -

A Deed of 30 years standing may be read without proof of ex- 88
ecution, provided the possession has followed the provisions, and there is no ap-
parent ~~cessure~~ ^{cessure} or alteration (*Pr* 110. *Bull* 205. 6. 6. 100. 1 *Exp* 275. *Exp*. D. 774.
257. *Sw*. w. 33. 2 *Bl* *R* 532. 2 *J.R*. 466. 5 *th* 259.) This is "ex necessitate."

The rule however, being founded in presumption, does not hold where
there are circumstances from which a contrary presumption arises, as *q*. *Ex*.
Gill 100-1 *sure*, alteration, inconsistent possession of the subject (*Pr* 110. *Sw* 33. *Bull* 205.)

So if the deed were of a reversion, (for there could be no post-) and a subsequent
Deed of the same int. had been made to another, who proves his deed (*Pr* 110. *Bull* 205.)

In these cases the ordinary rule must be given. The presumption from
ambiguity being destroyed by an opposite presumption (Gill 101. *Pr* 110. *Sw* 334.)

Ancient Deeds found among the deeds & maniments of title have been
admitted to their

The recital of one deed in another, has been considered as sufficient evidence, of the recited
deed, as of the party to the reciting deed (*Pr* 111. *See* *R* 286. *Sw* 34.) This however
is now regarded as secondary evidence, and admissible only when the recited
deed is shown to be lost, or when some other reason is given for not producing
it (*Pr* 111. *Hard* 120. 2 *Sw*. 108. 6 *Mod* 45.)

Formerly if there was any *cessure*, *int* *claiming* or apparent alteration in 89
a deed, the judges determined upon the view of it, on *proof*, whether it was good
or not, i.e. whether it was the instrument delivered or not (Gill 102. 10 *Co* 92. *Deed* 53.)

But in Modern practice, the question is left to the jury upon the
issue of "non est factum". -

As to the effect of alteration in Deeds by the party, ~~read~~ by Strangers,
vid *See* by *Deed* 54. 5. *forgery*. Gill 105. 11 *Co* 27. *See* 1160. -

Explanation of written instruments. - A Deed or other instrument when proved is conclusive upon the parties to it. Hence it cannot be contradicted by parol evidence (R 112. 5 Co 68. 3 Wils 275. 1 Bro chy 92. Rob. st. fr. 9. 10. 2 RR 49. 2 Mac 307. 266

But a latent ambiguity arising in the construction of a Deed, or other instrument may be explained. - (R 112. 1 J. R. 703. 7 ib 138. 1 Bro ch. 473. Sw. 37. 2 Corn R 69.)

By a latent ambiguity is meant an uncertainty arising not upon the face of the writing, but from some extrinsic fact, provable by parol; in which case the uncertainty may be removed by the same kind of evd. (R 112. Sw. 38. -)

In such cases, the parol evd does not affect the construction of the instrument, but only ascertains the subject matter, persons &c to which the instrument relates. ex. gr. Devise to A, there being two of that name. (R 112. 1 Bl R 60. 5 Co 68. 1 Roll 676. Sw 38. 2 ves 211. 1 P. Wms 420. 35. 8 Co 155. 5 Taunt 147. 3 M. & S. 171. 4.)

So when the Devisee's name is mistaken (R 114. 6 J. R. 671. 2 P. W. 141. Sw 37. 2 Bay 11) evd of his name is wholly mistaken. (R 117. 2 At R. 240.)

But the declarations made by the Testator, long before making the will, are not admissible (6 J. R 671. R 114. n.)

So if one having two Manors of Dale, devises a fine of the "manor of Dale" circumstances may be proved to show what one was intended. (R 112. Roll 676.)

When there is a right name & wrong description, a devise may be carried into effect, by the aid of parol evd, if there is no other person to whom the description applies. If there is, it is void from uncertainty. -

Same distinction, when the name when the name is wrong and the description right (Sw 37. 1 Bro. chy 30. 1 ves. Sr 266. 2 ib 42. 6 J. R 671.)

So parol evd is admissible to rebut an Equity, or to overturn an Equitable presumption, or implication arising upon the face of the instrument. - For in the first case, it is discretionary with the Ct of Eq^y to receive an Eq^y, and in the second, presumptions prevail only, when there is no evd to rebut them. - ex. gr. when one gives a legacy to his Ex^t without disposing of the surplus, ch^l will permit parol evd to show that the Testator intended that the

204 surplus sh^d go to the Ex^r. For by Law the Ex^r was entitled to it, and the wid^r is admitted to ~~rebut~~ a contrary rule of Ex^r, founded on a presumption, arising from the legacy: not to oppose the apparent intention according to construction of law - but to support it (Pr 113. Co 40. Bull 297. Talb 240. 1 Por. C. 427. 2 Atk 68. 220: 2 Ves 91.) But such evid in support of the Ex^r presumption vs the legal is not admitted. (Elb)

For a more full explanation of the doctrine of rebutting an Equity, see Por of Chy. 19. 1 Touch 384. 1 Vern 240. 3 P. Wms 40. Talb 79. 246. 1 Bro. Chy 201. 328. Co 40. 2 Ves 299. 375. 3 Atk 337. 6 Ves 323. 7th 211. Devisees 112.

But where the Testator expressly bequeathed the residue to his Ex^r who owed the Testator by bond, parol evid was not admitted to prove that the Testator intended to extinguish the bond. This wd have been vs the apparent intent or legal effect of the will (Pr 113. Talb 240.)

So a fine being levied, without declaring any use, parol evid was admitted to vest the use in the connasee. Thus rebutting the presumption of a resulting trust to Connasee (Pr 113. Gill cas 16. Day 26.)

Secus if a third person had claimed the use & offered the evid. (Elb). -

So an implied revocation of a will, from the subsequent marriage of the Testator & birth of a child, may be rebutted by parol evid. (Pr. 114. Devisees) this such presumption could be established by such evid (5 T. R 149. Pr. 114.)

But the presumption of revocation arising from a change of the Testator's estate, cannot be thus rebutted: for here the intention does not govern (Pr 114. 2 Atk 36 576. Devisees 91. 103. 105. &c.)

A Potest ambiguity, i.e. one arising out of the terms of the instrument, cannot regularly be explained by parol evid. For questions arising upon the face of an instrument are matters of legal construction, to be determined from the instrument itself. vide Lord Bacon's reason. (Pr 116. Bac Evid. 82. 2 Vern 624. Co 58. 3 Bro Chy 311 2 Atk 239. 3 Ves 448. 4th 680.) 24. 91. Devise to one of the sons of L. S. he having several. -

In some exempt cases however, Patent ambiguities have been explained, and words not in themselves ambiguous, have received a construction variant from the ordinary import, upon extrinsic proof of the circumstances, of the Testator, of the value of the property in question, of the condition of his family, of the state of his property &c. but not of his declarations: see these cases all explained in Devisees. 114. 17. (Porr. D. 502. 19. R. 116. Sta 281. 93. 3 Kelt 49. 610. 16. 1 Freeman. 479. 2 Eq. cas 293. 3 Burr 1898. R. ch 7. Salk R. 234. Ld Ray 831. 1 Bro. ch 472.) —

But parol evi^d is not admissible to contradict, enlarge, or restrain an express agreement in writing. &c. written agreement for a lease for ten years at \$100. Parol evi^d, that the lessee was to pay a greater or less sum, or that the time was five or fifteen years, is not admissible (R. 117. 2 Bl. R. 1249. 3 Wils. 275. 1 Bro. ch 92. 249. 1 Foub 188. 6 T. R. 452. 11 Por ch 429. 31. Corp 47.)

But when the writing is unsealed wd not the evi^d be admissible but for the sh. of ⁹⁵frauds? 1 Corren 249. 18 Johns 45. 3 Corp 57.)

But collateral matters about wh the written agreement is not conversant, may be proved by parol. (R. 17. 8 T. R. 379. 2 Bl R 1250.) ex. gr. that the lessee was to repair (12. Mass 85.) And parol evi^d is always admiss^e to shew that the instrument in question is not the act^g the party, whose act it purports to be. &c. that a deed was not sealed or delivered as the Law requires, that a deed or devise was falsely read to the grantor, or Testator &c. (R. 118. 8 T. R. 167. Sir 38.)

So to prove an instrument illegal, as for usury &c. (R. 49. 2 Wils 347. 3 T. R. 474. 2 Wils. 477.) In such cases, the evi^d is not admitted to contradict a valid instrument, but to shew that it is not what it imports to be — to set it aside. —

So to shew that an apparent illegality in the instrument was occasioned by mistake in the scrivener, &c. the reservation of illegal interest (2 Mos 207.)

95- If an ambiguity arises in an ancient instrument, uniform usage under it, such as is in the nature of a practical construction, may be admitted to explain it.

(R. 119. 20. 2 Inst 11. 283. 3 Atk. 576. 3 T. R. 279. 288. 4 W 810. 6 id 588. Corp 248. 4 East 327.)

2 Taunt 120. 12 East 559. 74 East 349. 1 M. & Sel 101. 1 Camp 22. 16 Johns 302. Taunt 782.)

On a cont. for a renewal in a lease, evidence of several former renewals was admitted to shew that a perpetual renewal was intended (Comp 819.)

But see contra 3 Ves Jr 298. 6 ib 207. 2 n. 448.) -

A receipt not under seal, may at Com. Law be explained or contradicted by parol evd. ex. a receipt expressed to be in full (Ph 74. 2 T.R. 366. n 266 1 Conn: rep. 414. 5 Ves Jr 87. 12 Johns 531. 1 ib 145. 2 L. rep 378. 3 ib 309. 5 ib 63. 2 ib 389. 9 ib 310. 11 Mass 27.) for such writing is of no greater solemnity at Com. Law, than a parol cont., only *prima facie* evidence. -

So of a Bill of Lading wh. includes a receipt. ex. Recd. &c in good order &c this may be contradicted by parol evidence (Ph. 74. n. 7 Mass 299.

So an acknowledgment in a Deed by Trustees, of consid^r recd one of them may shew by parol, that the whole went into the hands of the other. -

Ph 74. n. 4 Johns 23.) This is consistent with the Deed (3 T.R 871.)

But in genl it is said, a written cont. not sealed, cannot be contradicted, nor varied, nor (except in the case of a latent ambiguity) explained by parol evd at Com. Law, independently of the Stat of Frauds, provided it is complete in itself, and capable of a sensible explanation (11 Mass 27. 2 Bl. R. 1249. 2 B. & P. 356. ⁶⁵) See gen. upon the aigl. principles of the Act. ante 74.

Of Parol Evidence. Who are competent witnesses & who not?

A person is said to be a competent witness, when he may legally be admitted to testify at all - and Competency is a question of Law to be decided by the Ct. His credibility is the credit to wh. his testimony is entitled, and this is a question of fact, left to the Jury (Re 134. n. 1 Burr 417.)

In Genl all persons, not rendered incompetent by some legal disqualification are admissible witnesses (1 McCr. 95. 6.)

No person can be admitted as a witness who is not "compos mentis" i. e. not in the full possession & exercise of his understanding (Re 122. 5 Gill 144. 2044.)

Hence Idols & Lunatics (except in lucid intervals) are not admissible (Pr 123. 210 Bull 293. Gilt 144. Sw. 46.) - Not moral agents. -

Persons intoxicated at the time they are offered as witnesses, are rejected, (semb) for a temporary derangement of mind. 26 Johns 143)

Same rule applies to infants of so tender an age, as to be incapable of understanding the obligation of an oath (Pr 123. Gilt 144. Sw 44. Sta 700. -)

An infant of 14. is *prima facie*, as capable as an adult: so that the "onus probandi" lies upon the party objecting to his admission (Pr 123. Gilt 144. 1 Hal P.C. 163. 1 Inst 66. 1 Mc N 149. -

Under that age his competency depends upon his apparent understanding wh. is to be discovered by a previous examination (Pr 123. Gilt 144.)

It has been said that no person under the age of nine, has ever been admitted to testify; and very seldom any one under ten. (Sta 701. 1 Mc N 153. Pr 113. n.) children under this age are of course rejected. -

The rule however appears to be now, that a child of any age may be examined, if he appears upon a previous examination to be acquainted with the obligation of an oath (Pr 123. n. Bull 293. 1 And Pl. C. 1461. Gilt 144. Sw 45. 1. 1 Mc N 149. 151. 4. 1 ARR 29. Leach 114. 346. Post 70. 1 Mod 228. 1 Hale 302.)

Thus an infant of seven years of age has been admitted even in Capital cases. Sw 45. Leach. C. C. 482. -

Formerly infants too young to testify under oath, were allowed to testify without oath (1 Mc N 150. 291. 1 Hale P.C. 634.) - But this practice is now exploded, and infants are of course not allowed to give evidence at all, except under oath (Leach C. C. 114. 346. 164. 1 Mc N 151. 1 ARR 29.) -

A Slave is not as such an incompetent witness (1 Mc N 151.) See in Prince 4 Dall 145 n. 6.) and as to slave holding states Gen. & in 7 W Va R, excluded by stat, except for a vs each other, in a capital case. -

A person deaf & dumb, if shown to be of sufficient understanding, Sw 46. - 1 Mc N 156. may testify by signs, thro' a sworn interpreter (Pr 123. 4. Leach 316. 47-94. 455.)

Here ignorance may disqualify a person from being a witness, e.g. ignorance of the obligation of an oath - or of a future state (Sw 47. 2 Leach 482)

The previous examination in this case was on the "voir dire". Qu. shd it not be without oath, as in the case of infants?

It was formerly supposed that infidels were incompetent, as having no regard to the obligation of an oath (Pr 139. 1 Hawk 434. 7 Co 17. Co Litt 6.)

But now Gen 4, no persons except atheists are excluded on the score of infidelity, or rather, none are excluded on this ground who believe in the being of a God, the obligation of an oath, and a future state of retribution (Pr 141. 2. 1 Atk 21. 1 Wils 34. Wills 538. Peas 11. Leach 58. 348. 482. Sw 48. Esp. D. 726. 1 McC 64. 95. 6. 261. Sta 1104.)

So that infidels believing those doctrines are admitted to testify on being sworn according to the ceremonies of their own religion (ib) But still persons disbelieving those doctrines, or either of them, are incompetent. (1 McC 98. 1 Atk 45.) And the proper enquiry on this point is, not whether the witness believes in a Saviour, the Gospel, or the Bible, but whether he believes in the above doctrines. - (Pr. cas 11. 1 McC 261. -)

The question whether a person offered as a witness, believes these doctrines is usually decided, it seems by examining him (not under oath) before he testifies upon the issue, (Pr cas 11. Sw 50. 1 McC 261.)

But the enquiry has sometimes been made by way of cross examination Qu. Is this mode proper? for the objection goes on his taking an oath (4 Day 567.)

Our own Cs have admitted proof of the previous declaration of the witness to show his disbelief in these doctrines, & thus exclude him (4 Day 57.)

Qu. can such proof be admitted on principle, except to contradict his answer on his own examination, and thus to discredit his testimony? If it can, a witness may by false declarations out of Ct, & when not under oath, deprive a party of his testimony. See vide Sw. 50. 49. 92. 2 Burr 46. 34 where a witness's confession of interest, when under oath, in another

case, was admitted to destroy his competency. —

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Quakers, who believe it to be unlawful to take an oath, are admitted by English Stat. 7 & 8. Wm. 3^d & 1 Geo. 1st, 3 Geo. 1 & 22^d Geo. 2^d, to give evidence in civil cases without oath, upon affirmation (2 Stra 1219. Pr 143. Corp 382.)

But not in criminal prosecutions. — (5 T. R. 158. Esp 728. Pr 143. Stra 854. 72. 946. & 200. Burr 117. —

But a Quaker's affirmation, in the form of an affidavit may be read, to exculpate himself in a criminal proceeding (Pr 143. 2 Burr 117 ante 109.)

In Court Quakers are by Stat. enabled to testify upon affirmation in all cases, criminal as well as civil (11 Con 559.) So of all persons who are conscientiously opposed to taking an oath. —

A person may be incompetent to testify from the infamy of his character Rule. A person legally infamous, is regularly an incompetent witness in any case (Pr 124. Gibb 139. Stra 833. 1148.) By persons legally infamous are meant those who have been convicted of some infamous crime, as treason, felony, &c. the "crimen falsi" as perjury, forgery &c. or any crime wh. in its nature impeaches his integrity, as barratry or conspiracy (Pr 126. 7. Leach C.C. 382. 2476. 308. 2 Mth 18. Corp 3. 5 Mod 75. 1 W & A 208. 37. 463. Sw. 2052. SaKR 690. Stra 1148. Gibb 139. Com. D. Test. n. 2. —

Formerly conviction of an offence wh. incurred infamous punishment (as the pillory) was considered as rendering the offender infamous, whatever the offence might have been (Pr 127. Sw 52. 2 Hall P.C. 277. 8. 1 Mc N 140. 208. 2 Inst 292.)

But it is now settled that the nature of the offence, not the punishment decides the infamy (SaKR 689. 90) & it is an Act. —

Hence conviction of an infamous offence, renders the offender incompetent tho the punishment shd only be a fine. (as barratry) Pr. 127. Gibb 140. &c.

E. contra, conviction of a libel tho followed by the punishment of the pillory does not destroy one's competency (Pr 127. 3 Dev 426. 1 Mc N 207.)

When legal infamy is merely a consequence of conviction, the party is restored to his competency by a pardon, from the Executive Government

213. as when one is convicted of perjury, or any other infamous crime at Com. Law. -
Pi 128. 4. 100. 249. 20 Ray 257. 8. Leach 339. 1 Mc N 212. 17. 72 R. 403. arg^e
SalR 689. 2 Hawk 558. 609. Est 724. 9. Aliter when the incompetency is by
stat made a substantial part of the punishment; and it wd be more correct
to say part of the judgment a sentence? I was on a conviction of perjury under
stat 5 Cl. ch. 9. (Pi 127. 1 Mc N 230. SalR 574. 170. 3 Lev 426. Com. D. Test a. 5.
For an executive pardon dispenses only with the legal consequences of a
judgment; it cannot destroy the judgment, wch as regards the legal infamy is ex-
ecuted or removed. In the last case nothing short of a reversal of the
judgment on the conviction, or a statutory pardon, will restore his competency;
either of these will restore it. (Pi 128. SalR 689. Com. D. Test. a. 5.)

Ray 380. If one is convicted of a chargeable felony & breach in the land, the
Rele 37. burning restores the competency, for it amounts to a statutory pardon (Pi 128. Leach 110.

So now under stat 19 Geo 3^d c 74. if whipped or fined. But the
conviction in these cases may go to his credit (semb). (Com. D. Test a. 5.)

But a conviction of an infamous crime without a judgment in pur- 100
suance of it is no disqualification of a witness (Pi 128. 9. 100. 57. Corp. 3. Mod. 110. 574.
SalR 686. 3 for a verdict with^t a judgment is no void of a fact found by it in
any case (8 Bull 243. Sta 161. 349. Com. D. Test a. 5. 20 a. b.)

But proof of the exec^t of a judgment, i. e. the infliction of the punishment
is not necessary: for the infamy incurred by the conviction does not depend
upon the punishment (Pi 127. 1052. 8 Mod 75. 2 Wils 18. Com. D. Test a. 5.)

And it seems now settled, in principle, after a series of contradictory op-
inions, that the proof of a witness's legal infamy can be made no other-
wise than producing the record of his conviction (8 East 77. 2 Hawk 46.
Pill 292. Com. D. Test a. 5. 4 Bay 123. 13 clohm 82. 1 Mc N 206. SalR 653. 12 Mod 586.
11 East 309. 2 Starkie 57. 241. 1 Holt. St. R. Exp 571. Doug 593. 20 Ray 7088. 1065. 246. 2.

Tho there have been cases in wch the witness has been called
upon to disclose the fact upon the 'voir dire' (17 R 440. Pi. 129. 133.

1 Mc N 240. 13. 208. Leach 332. 3 East 403.) — But this practice seems entirely opposed to principle: for 1st. No one is bound to accuse or disgrace himself (scilicet) thus on an indictment for Rape, the woman is not obliged to answer as to any prior connection with others, nor is a man compelled to answer whether he is the father of an illegitimate child (Ph 206. 3 Corp 210. 578. 13 East 580.)

2^d The party who produces the witness, has a right to insist upon not being prejudiced, in his proof, otherwise, by any matter appearing on record, unless record evd. is produced (ante 26.) 3^d. A witness is not presumed to understand the contents or construction of a record, or the precise nature of a conviction. It must be lodged of by the Ct, by inspection. —

101.

Whether a witness is obliged to answer any question, the answer to w^{ch}. would tend to disgrace him, tho' it would not charge him with any crime, is said not to be fully settled. — (Pr 129. 138. Phil 208. 7. 8. 246. Salk 103. 17 fr. 748. 2 fr. 670. 6 fr. 259. 13 Johns 82.) Scilicet not on principle. —

Whether a person is bound to give evd. w^{ch} would subject him to a civil action, w^{ch} Phil 208. By Stat 46. Geo 3^d it is declared that he is (3 Cora Rep 529. 13 Johns 82.)

A person being legally infamous, is not disabled to make an affidavit, in defence of a charge laid vs himself. If he were, he might be deprived of the means of defending himself (Salk 461. 10 Johns 1. 1 Mc N 241.) This point has often been ruled upon motions for information or attachment (Post 105.)

The good character of a witness not legally infamous, may be proved not indeed to exclude him as incompetent, but to detract from his credibility. (Pr 124. 5.) The evd. w^{ch}. the law permits thus to impeach his credit, is confined to his good character. Particular facts cannot be proved for this purpose; for he cannot be supposed prepared to meet specific charges vs him without notice (Pr 125. Bull 296. Phil 212. 4 Esp 102. 4 fr. 693.)

Evd of this kind can be given only by those who are acquainted with the witness's good character: And the q^u. is ring^d is, whether in their opinion he ought to be believed, when under oath? or whether they would believe him

215 when under oath? *Pr 125. cas 11. 4 Esp 103. 4. Phil 212.*)

In Court the only question allowed to be put, is "what is the witness's *genl* character for veracity?" the individual opinion of the impeaching witness, as to the other's veracity is never admitted in this state. -

But tho' *genl* evd. only can be given to impeach the credit of a witness, yet the party producing him may call on the impeaching witness to disclose the grounds of their opinion. (*Pr 125. 4 Esp. 103. 4 Phil 212.*)

If the witnesses to a will are dead, and fraud in proving it is imputed to them, the devisee may give evd. of their *genl* character for probity. (*4 Esp. 50. Sur. 144. Phil 212. ante 86.*) If they were alive & testified, their *genl* character as testifying witnesses might be impeached, as in last page. -

Previous declarations made by a witness out of Ct. & which are inconsistent with a discredit his testimony, may be proved to discredit his evd. (*Pr 125. 6. Phil 212. 2 Esp 691.*) or a letter written by him - (*Staines 279*) - or a deposition signed by him. And after the death of the subscribing witness to a will, his confession on his death bed, that the will was forged, may be given in evd. to counteract the presumption arising from his attestation. (*Pr 129. 3 Burr 1244. 55. 1 Mc N 386. 6 East 188. Sur 125. ante 18.*)

The party producing a witness is never allowed directly to impeach his character, even by *genl* evd. But a party may exhibit testimony contradictory to what his witness has sworn. Hence the impeachment, if any, is only consequential (*2 Starkie 334. Pr. 129. Sur. 144. Phil 212. Bull 297. 2 Esp 536.*)

In answer to evd. as to the credit of a witness, the party producing him may attack the character of the impeaching witness, or give evd. in favour of the character of his own (*Phil 212.*) In Court, he may by way of answer to such impeachment, prove that his witness had before made the same statement on other occasions as in his testimony (*Bull 294. Gilt 135. 1 Mod 282. Phil 212. 13. n.*)

The testimony of a witness may be discredited by proving, that he was intoxicated at the time of the transaction testified about. (*Sur 144. 2 Bay 24.*)

An accomplice may testify either for or ~~as~~ his fellow, tho' in the latter case, when the prosecution is civil, his interest will go to his credit. ⁺ Pr 138. q. Hard 162. 1 Mc N 183. 193. 203. 4. 379. Kelb 17. Sta 420. Sw 76. Bull 286. Exp. E. 725. 2 Hawk 608. 9.)
 + In testifying as the deft in a civil case, is he not interested in the event? as a recovery by Plff w^o bar an action vs himself for the same wrong. — And, doubtless, his credit may be affected by the offence, or wrong, of wh^{ch} he confesses himself guilty. —

And if an accomplice whom the Plff or prosecutor wishes to call as witness is made a co-deft, the Plff (if the case is civil) may with leave of the Ct, strike out his name; and in a criminal case, the prosecutor may enter a not proseq. as to him, & then examine him (Pr 138. q. Bull 185. 1844. Post 120.

That an accomplice has rec^d a promise of pardon, or a reward on the condition of his giving ev^d, goes to his credit, but not to his competency. ⁺
 Pr 139. 1 Mc N 140. 200. Kelb 18. 2 Hawk c. 46. vide contra 2 Hal P.C. 280. 33. 1 Mc N. 194. 200.
 + Note If the condition was that he sh^d testify as deft w^o he be competent? (1 Mc N. 194. 200. Kelb 18. 2 Hale 288.) Perhaps it w^d be difficult to shew on principle, that the public could in this way be deprived of his testimony; but the fact w^d greatly impair his credit — Dangerous to confide in such ev^d. —

106. Another of the most usual grounds of incompetency in a witness is interest. For nearly an interest in the question at trial, rendered a witness in many cases incompetent (Pr 144. 5. Phil 35. 6. 7. 8. 15 R 200. Selk 283. Sta 1043.)

By an interest in the question is meant the interest the witness has (or rather the influence he is under) from being in the same situation as the party by whom he is offered, in relation to the fact to be tried; or in other words, from his having or being exposed to the same claim wh^{ch} may arise out of the facts in question: tho' his right w^d not be affected by the verdict or judgment, in the case in wh^{ch} he is offered as a witness. — Pr 144. 5. Phil 35. 7.) ex. gr. action vs one underwriter, and another upon the same policy offered as witness for him to prove some fact wh^{ch} w^d be a defence for both. —

217 So an action vs one commoner, and a fellow commoner offered as a witness on his side.
 - Separate indictments vs A. & B. in perjury in swearing to the same fact, & A offered as wit-
 for B. - Action by a master for beating his servant, laid with a "per quod," and the
 servant offered as a witness for him. - One person injured by a Trespass, offered as a
 witness for another injured by the same Trespass - for the event of the suit, what-
 ever it be, does not affect the witness (8 Johns 377. Pr and 166. Sta 575. 444. 1054.
 3 Wils 13. 1 Root 473.) Contra Sta 444. -

But it is now settled, since the case of Bent vs Bickel (3 T.R 336.) that
 this species of interest goes only to the credit of the witness and not to his com-
 petency (Pr 144. 6. 1 T.R. 63. 303. 3 id 36. 7 id 60. 603. 4 Burr 2225. 2 T.R. 496.
 4 id 20. 589. 4 A. Bl 303. Hard 358.) - Hence in the examples given above,
 of an action vs one underwriter &c, the witness, tho' interested in the question, is
 competent. (3 T.R. 36. 1 id 307. 2 Roll 685. Ph 87. Bull 283. 5 T.R 604.) and the
 genl rule now is, that a witness is not disqualified on the ground of interest, 107
 unless he is interested in the event of the suit, i.e. in a situation to be im-
 mediately benefitted or injured by the event of it.

(Pr 144. Ph 36. 3 Johns 83. 4 id 302. 5 id 255. 1 Bay 266. 270. 2 id 531. 6 Binney 316.
 1 Hard 6. 2 Starkie 68. 4 Taunt 18.) -

Hence a woman whose Husband has been convicted of a capital crime, was admitted
 as a competent witness vs others indicted for the same offence, tho' she confessed,
 that she hoped the conviction of the others might procure his pardon - a pardon
 not being the necessary consequence of the conviction of the others (Pr 146. Ph 37.)

So in civil prosecutions, the person injured by the offence is regularly a
 competent witness for the prosecutor, tho' he may have a claim vs the accused for the
 civil injury, involved in the crime &c. (Pr 146. 4 Burr 2225. Phil 86. 90. 7 T.R 76. 1087.
 4 East 531. 1 Taunt 520.) - for he has no interest in the event of the prosecution, as the
 verdict in it cannot be given in reward for or vs him, the influence or interest there-
 fore goes to his credit. * Note unless (it has been said) the verdict in the pro-
 secution can be given in reward in his civil suit. But there is no case, I trust, in

wh. at Com. Law, it can be so given in ev^d. - (R 45. b. 146. Ph 87. 3. 4 East 577. n. 581. 1 Comp 218
9. 157. 4 Burr 2225 unle 60.) Thus upon an indictment w^t for a battery on B, or for
stealing his goods, B is a competent witness; this indeed has never been doubted. -
R 143. Hard 331. Ph 86. 7. 1 Sid 211. 2 Bac 291. 1 McC 53. 1 Roll 403. 2 ib 683; -

88. So upon an indictment for robbery, tho' the witness is entitled to a restitution
of his property on conviction (Ph 87. 9 Mass 30. Leach 290. 1 McC 50. 61. 116. 114.)
- for he is entitled to the property, if it is his, whether a conviction ensues or not. -
So in pro^{se} for a cheat. - (Ph 87. 1 Vent 49. 2 Sid 431. Salk 286. Contra Salk 283. Sta 1043. -

So for perjury at Com. Law (Sta 1042. 1104. Salk 282. Hard 381) but these
three last cases are overruled (4 Burr 2225. Ph 87. R cas 104. 2. 146. 8. n. -)

And in the case of perjury it is not material whether the witness has or has
not satisfied the judgment obtained of him by the offender (Ph 87. 4 Burr 2225. 4 East 577.
4 Dall 472. Contra 1 Esp. 97. R cas 12. G. 11 124.) -

So (seem) in a pro^{se} contra for perjury under the stat 5 Eliz ch. 9. wh gives
the party aggrieved half the forfeiture. For in his action to recover it, the record of
the conviction upon the indictment. (It is supposed) wd not be evi^d.? Ph 88. -
Contra Gilt 124. 2 Roll 685. Bull 289. 2 Ray 1229. 7. 2u? wd it not be evi^d of
the fact that a conviction had been obtained? How else wd the witness recover
his half of the forfeiture?

And even persons to whom bounties are given by st for apprehending and
prosecuting offenders, are competent witnesses as them (Ph 86. 7. 94. R 171. 3. 152. a
Mils 422. Leach 290. McC 50. 61. 116. 114. 179.) Here indeed there is a direct inter-
est in the event; but if their evi^d was not admitted, the very object of the stat
wd be defeated; - that object being to induce those having knowledge of the offence
to prosecute (R 171. 3. 2 Mils 422. 3 East 403. 4 Dall 180.) See 2u as to propriety of this. -

109. So on an indictment for tearing a note, the promisor is competent (R 147. n. 595. -
So upon a pro^{se} contra for using the borrower is competent to prove the whole case, whether
he has repaid the loan or not (R 147. 8. n. 4 Burr 2257. 7 T R 60. 2 ib 496. 1 Carn 168.
5 Mass 53. Phil 90. Contra Gilt 124. -)

219 Same rule tho' the note has been registered 53 Mass 53. Ph 96. 39. 34th a. 40 a. a. 7 J. & R. 1845.
But a prosecutor on a perjury, who is entitled to part of the penalty is incompetent to testify in support of the prosecu^r = (2 Cr 152. n. See 315. 9 case) cited. 1 Rep 95. Contra Gill 132. 3 Elliot 114. R. Cal 218.) he is himself 1846. 5

+ But in the single case of a prosecutor for forgery, it has always been holden, that the party by whom the instrument purports to have been made is incompetent: - If the instrument, supposing it genuine wd subject him to a suit, or deprive him of a right or claim (2 East. 3. C. 995. 2 N. Rep. 87. R. 147. 8. 168. 9. Ph 88. 90. Haad 321. 3 Wall 172. See 728. Leach 10. 29. 255.) Rule the same it seems, even if the witness in whose name the obligatⁿ is forged has before paid it (R. 146.)

Qu. if paid in pursuance of a judgment recovered, what possible interest can there be in the question? - His incompetency extends to every fact wh might conduce to prove the forgery, and is not confined to the mere handwriting (comb) Ph 87. 8. R. 168. 2 N. Rep. 90. 92. 2 East P. C. 996.) -

Qu. if a collateral fact not conducing to prove the offence: as, that the witness offered, is the person named in the forged writing (Ph 89. Leach 487.) 2 East p. C. 997. 1 Ch. C. N 143.) Qu. upon what principle is this rule founded? the effect of forfeiture? 2 P. C. East 994.)

110 This it is said wd go only to the credit - & 2dly besides, the instrument may be forged in favor of a stranger. Is it the practice of impeaching the forged instrument? this wd destroy it. The rule seems to be an anomaly, supported by the stringth of precedent (Ph 90. 1. n. 4 Johns 296. 302. 3.)

But on the other hand, forgery is not felony by the com. Law, nor in all cases by the Eng. statutes. -

The rule does not hold, however, when the party whose name is forged wd not be personally interested or affected by the forged instrument, supposing it genuine. - e.g. - Cathin's name forged to a Bank note, he is a competent witness. (Leach 57. 350. 1 McC 120. R. 169. Ph 89. Bull 289. 2 East p. C 1000. post 138. -

So when a Banker has paid a forged draft, but struck the money

out of his account, thus destroying his claim for it, he was holden competent. —

So where one whose name has been forged to a receipt, had recovered from the prisoner, the money it purports to be given for (Pr 169. Bull 289.)

- 11 But where the person, in whose name &c, wd be at all affected by the instrument of genuine, he is said to be incompetent, and the rule has been holden to extend to all other persons, interested in the question. — Thus on an indictment for forging a will, the Ex^r named in a fals^d will, was holden not competent to prove the other forged (Pr 169. Leach 29.) Rule holden to be the same as to a Legatee (Ph 90. Hawk 331. 3 Tal R 172.) &c. &c. as to these cases, & see Phil 90 n. 4. 4 Burr 2254. where Lord Mansf^d disapproves of them. I. G. of course —

But the person whose name has been forged to an obligatⁿ of any kind, may be rendered competent by a release from the party in whose favor the instrument purports to bind him (Pr 169. n. Leach 184.) &c. &c. From the holder of a forged bill; the obligee in a false bond &c. &c. Phil 98.)

In Conn the Genl rule excluding the party whose name is forged, has been lately rejected by the Sup^r Ct. So in Mass. & Penn. also (emb) N. Y. (Ph 91. n. 1 Mass R 7. 3d 82. 1 Dall 110. 2d 239. 2 N R 96. n. 4 Johns 296. n. 302. 3.)

But a person interested in the result of a suit of wh he is offered as a witness, is regularly incompetent (Pr 144. 6. 164. 170. 2 Ph 43. 9. 50. 3 J. R. 36. 7th 60. 603. 2d 496. 4 Burr 2257. 57.) Exceptions ante 108. post 120. —

- By an interest in the result is meant, an immediate & certain benefit, 112 or disadvantage to accrue to the witness from the result of the suit. An other witness a witness is interested in the result of the suit, only when he will on the ^{one} ~~the~~ hand gain some certain immediate right or exemption from loss, or liability, by a determination in favor of the party by whom he is offered; or on the other hand, incur some certain, immediate loss, or liability to loss, in consequence of a determination in favor of the opposite party (Pr 144. Bull 168. 7. 4 J. R. 20. 3d 32. 2 Johns Cas 238. 4 Johns R 302. 5th 257. 1b. 1b 89. —

And in genl, tho' not universally, the question whether

221. a witness offered & interested or not in the suit, depends upon the question, whether the record of the cause in which he is offered, can afterwards be given in evidence for or against him in any suit, in which he himself may be a party? (Post 124.) Ph 434. 9. 50. 5 T R 32. 5. 6. 308. 7th 62. 4 East 58. 4 Johns 230. 5th 144. 3 Esp. Cas 486. 4 East 572. 10ay 26. —
*Note, this has in some instances been regarded as the only criterion of interest in the work (Ph 4950. 3 T R 32. 5th 144. 7th 62. 2 Johns cas 255.)
Contra Phil 50. 4 T R 19. 5th 667. 2 East 561. —

if then a verdict or judgment, for the party who offered him & thus be given in evidence, in the witness's own favor, or a verdict for the other party or him, he is of course and universally interested in the result and regularly incompetent (ibid) *Note. would it not be more correct to say, if on recovery by the party, &c. the record be given in evidence. —

But if the verdict or judgment, cannot thus be used for or against the witness, he is generally competent, tho' not universally so (ibid) for, there may be what is considered an interest in the result, when the record cannot thus be given in evidence; tho' cases of this kind are rare, being only exceptions to the general rule & criterion. (Phil 50. 2. 4 T R 19. 5th 667. 2 East 561.)
*Note these cases vide post 117. 124.)

Under the first branch of the distinction, in a suit by A claiming right of common by custom, B claiming under the same custom, is not competent to testify for the Plaintiff as B might afterwards use the verdict in support of his own claim (Ph 445. n. 10. T R 303. 2d 32. Bull 283. 5th 170. ante 55. 2 Johns 170.)
Secus if the question relates to a private prescriptive right of common, as a right belonging to the estate of A. In this case one claiming a similar right, as belonging to the estate of B, is competent. For this is not a public right — verdict not used for the witness (Phil 445. Bull 283. 12th 449. 2 Johns 170.) —

So a person liable for the costs of a suit on either side, is incompetent to testify on that side, as the record will be used against him. ex. gr. action

by infant Plff, his guardian a prochein ami is not a competent witness for him. 222
CPh 46. Sta 548. 1026. 4th 107. Pz 156. 2 Bae 680. 1 Eq. cas 73. 15 R 491. 1 W 4 130. 2
P. Wms 298. Hard 261. Pult & Child 56. 2 Court Rep 269. Lamb contra y R 476.
2 East 458. overruled 14 East 565. 2 Day 101. or 81 Prin 644. 5th 174. 4th 107.

So of any one who has agreed to indemnify Plff or costs (Ph 46. n. Pz 165
6 Sta 575. 11 Johns 407.) and for the same reason. — So of any one who
has given security in behalf of Plff for the costs; as commor in a bond for
prosecution. So of any one who is to receive the avails of the recovery or any
part of them. Ph 49. Sta 129. —)

For the same reason Defs bail cannot testify for him; as they become
immediately responsible for the satisfaction of what is recovered of him,
and the record is void as to them (Ph 46. 15 R 164. 8 Johns 407.) Secus if a
surety in an administration bond in an action as Adm^r or Ex^r. —

So in an action on a Plff for breach or neglect of duty by his deputy;
the latter is incompetent for the Plff without release (2d Ray 141. Pz 16.
Sta 650. 3 Camp 523. Pz 165.) It can make no difference, I trust, whether
the under Plff has given the Plff security or not — for he wd be liable
over in either case. vid Plffs & barbers. —

So of a servant in an action for his misconduct lost as the master (Ph 46.
15 R 589. 2d Ray 1007. 15 East 494. 1 Camp 252. 3d 576. Pz 165. 6. Sta 650. 12 R 339. —

The record wd be void as to the amt of damages. — Indeed a re-
covery as the master wd constitute his cause of action as the servt. So in the
last case. 1 Holt N. P. 134. Secus if released by master (Pz 165. 6
Sta 1083. Pz cas 53. 84. 12 R 339. —

115 So in an action on a policy of insurance for a loss by barratry of the
Master; he is not admissible for the underwriters, unless released by
them: for if they are subjected he is liable over to them, & the record wd
be void as to damages (Pz 166. 10. 12 R 13. 339. Ph 47. n. a. post 131.)

So in an action on a policy on goods shipped upon freight, the

223 owner of the ship is not admissible to prove her seaworthiness, unless released by Plff. (Pr 166. q. cas 84.) for if not seaworthy no be discharged and the ship-owner liable. * Note. wth the record in case of a verdict for debt beund^d or the witness for the purpose of proving as damages, the costs of the first suit? sent. L.G.

So in a suit by indorse or acceptor of a bill of exchange, accepted for accommodation of drawer, the latter is not a competent witness for debt, to prove the transfer aditious (Ph 46. 7. 4 Taunt 464. ^{Compell} 1 H. Bl 306. 10 Ta 575.) for he not be liable over to debt (if Plff shd recover) for all damages, as well as for the amt of the Bill (post 128.) Suppose it had not been for the drawers accommodation, wd he not have been equally incompetent? as his funds in debt's hands wd be liable to be applied to the debt. —

So on the other hand, if a witness for Plff, wd by subjecting Defendant to exonerate himself from any liability, he is incompetent (Ph 47. n.a. Pr cas 84. 4 Day 458. 2 Mass. R. 444. 4 H 658. 34. gr. case ante of Plff's surety for costs, his Guardian &c (Pr 171. 10a 586. 1026. Harv 202.) —

So a grantor who has conveyed land with a c^o of seizin & a warranty, 116 is inadmissible to prove the grantee's title in Ejectmt. (Pr 47. n.a. 3 Day 433. 2 Johns 394. 6 Johns 523. (wth c^o of B^rken) 5 Day 373. Pr 170. 2 Rolt 685. 3 Johns 22) for if grantee is evicted under elder title, grantor is bound to indemnify him. * Note. If the Deed contained only a c^o of seizin, how wd he be interested in the event, unless he had beenouched in? he wd be liable or not, independently of the event of the suit, on the c^o, if the c^o's were liable for the eviction in the first action, his interest wd be in the event. —

So of the vendor of a chattel, when the vendor's title is in question, there being an implied warranty of title. (Ph 47. n. 6 Johns 5.) See. this seems the same case in principle as the above of a c^o of seizin. —

But a Grantor, Lessor, a vendor without c^o of title & warranty express or implied, is admissible in support of the title (Ph 47. n. Pr 170. 10a 625)

Not interested in the result (2 Bui 95.) —

So if he has warranted merely as those claiming under himself, he is competent as to a party not claiming under him (Ph 47. n. 2 Mass 441. 2 Bui 95. 102. 500. 6 it 500. —

As the inhabitants of a town or parish liable to be rated for the poor (if not actually rated), are competent witnesses for the town or parish in a question of settlement — their interest being contingent (Ph 47. 4 T.R. 17. 6 it 157. 2 East 561. 15 it 47. R 163. 4.) They are admissible in court, tho' actually rated from supposed necessity (post 118.)

So in support of a "Quia Tamen" action for a penalty wh^{ch} if recovered will go to the support of the poor of the town. — Ph 48. n. 12 Johns 288. —

A third person is not competent in Ejectment, to testify that he himself and not the def^t is in possession — he has an immediate interest in defeating the action; for if it sh^d prevail, he wd be turned out of possession upon the recoⁿ (Ph 48. n. 6. 52. 2 Johns cas 275. 12 it 246. post 122.)

This is an example of interest in the result, tho' the record wd not be void for a v^{al}id witness in another suit (ante 113.) But the recoⁿ wd act directly upon his possession —

Still less as a general rule, can a party to a suit testify for himself or co-party, by reason of his immediate and necessary interest (R 149. Ph 57. 6 it 116. 1 Bui 230. 1 P Wms 596. 1 Day 106. 10 Johns 128. 4 Day 388.) and except 7 p. 123. 9.

So tho' he is a mere Trustee having no beneficial interest in the subject — for he is interested in the result, being liable for the costs. This liability is certain, and his ultimate indemnity contingent (R 141. 3 East 7. R cas 153 y J. R 668. Ph 57. 2 Day 462.)

So of an ex^{or} whether plff or def^t; tho' when plff he is not liable in England for costs (Ph 57. n. c. 1 Bui 464. 6 it 16. 1 P Wms 289. 2 Ves 43. 2 Bui 699. 3 Bui 24 2 East 183.) Is the reason that his disbursements may not be allowed, or is ^{ante 122} ~~is~~ a positive maxim that the presumption of interest in a party shall ^{post 118} not be rebutted? ~~See~~ ^{But} the latter, for his int in the former case is contingent.

But an adm^r "durable minority" is after his authority ceases, a competent witness for the Est; for he has then no int. (Ph. 57. n. c. 3d R 604.

And the members of a corporation having no individual interest in the suit, are admissible to testify for the corporation. As the members of a charitable corporation who had no beneficial int in the funds, and are not personally liable for the costs (Pr 149. 50. Ph 57. 98. Pr cas 153. 9 Johns 220. 8 d 462. 7 Mass. Reps. 3. MR 401.) Secd when the corporators are personally interested in the subject, as in the right of common exemption from tolls - Stock in a Bank &c. (1 Vent 351. Pr 149. 10 d 92. Rinn 174. 5 T. R 174.) -

And the smallness of interest in point of amt appears to make no difference 2 Nov 47. (Bull 290. Ph. 523. 57. 5 T. R 174. 11 Johns 57. Contra 2 Lev 231. Pr 161. n. 161³⁵⁷

But the competency of corporators is restored by disfranchisement. Emb Pr 164. 6 Mo 165. 11 Mo 225. Ph 98. 1 P. Wms 595 -

Secd if the judgment of disfranchisement is irregular, as it may be set aside (11 Mo 225. Ph 98. Pr 164.) -

Sole resignation of his corporate franchise (Ph 98. 3d R 432. Com. Franchise 40. Post 138.)

In Conn. members of public local corporations, as towns, Ecclesiastical societies &c. are competent in all cases when such corporations are parties - This is partly from the usual minuteness of individual interest, and partly from supposed necessity (Sw. 20 57. Ph 58. n.)

Secd of the members of a corporation of a private nature, as banking and Turnpike companies, Insurance Comp &c; as their interest is supposed to be more important generally, and there is not the same supposed necessity (Ph 58. n. Sw. 57. ante 31. -

Generally a deft cannot testify for his co-deft; for his evd wd go to prove at least, that they were not jointly liable as charged (ante 117.)

But if in an action sounding in tort, no evd whatever is given as one of the defts, he is entitled to be discharged, upon the close of Plffs evidence, and may

then testify for the other (1 Sid 237. Phil 61. bill 117. Bull 285. 1 East 313. 2 HawK c. 246. 498. 3 P. Wms 288. 1 Rest 132. Pr 152. 1 Mc N 204.) — Said to be discretionary with the judge whether he will grant an acquittal in the above case (Ph 20. 61. n. a. 1. Holt N. P. 276.) Not a matter of right. — But if there is any verdict in him, the whole case must go together to the jury (Ph 61. bill 117. Bull 285. 3 Esp 20. 14 John 119. 15 A 223.) —

So in respect of changing the wrong to have been committed by himself & B, if it appears that B was concerned in the trespass, and that process had issued in him, & an attempt made to arrest him, or the process lost, he is not admissible for default. Pr 153. Ph 61. Bull 286. Hard 264. 123. Contra 10 Johns 21. Ph 62. 7. Qu. upon what principle? not surely upon that of interest in the result; and he is not actually a party to the suit. — Since if more of these facts appear (Ph 61. 154. 1 app. 432. 6 Brinsley 316.) —

If mistress for Plaintiff is by mistake made default, the Court will on motion, suffer his name to be struck out, and he may then be examined for the Plaintiff (Ph 63. 1 Sid 441. Bull 285) In the case of an information the Atty Genl may enter a Nolle Prosequi, as to one of them, and then examine him as the others (Ph 63. 1 Sid 441. Hard 163. ante 103. (Butley 26)

On an indictment or several, one having submitted and paid his fine is competent for the others. The cause as to him being at an end. — (Ph 62. Sta 600.)

But merely suffering judgment to go by default does not restore his competency either for or as the ~~other~~ for he is a party to the record, and the case even as to him is not ended. Quoad the damages, he is still on trial (Ph 62. 5 Esp 155. Bull 285. 2 Camp 303. n. 10 Johns 95.) —

So when one of the defaulters on a joint contract has obtained his discharge under a Bankrupt Law — for he is a party to the record (Ph 62. n. 3 Esp 255) Besides if the other defaulters pay the whole sum recovered, he is compelled the Bankrupt to contribute unless prevented by some positive provision of the Stat of Bankruptcy. —

227 + so in an action on a joint contract as two, if one suffers judgment by default, he is not admissible for the other: for if the action fails as to one, it fails as to both: - for for Plff, for if the action prevails the party defaulted will be entitled to a contribution from his co-defts (Ph 62. 4 Tanc 453.)

But is not the balance of interest in this case clearly vs Plff: if so, why may he not testify for Plff.?

It has been holden that one of two defts in Torts having suffered a default (tho inadmissible for Plff & Corp 303a) is admissible for the other deft: for he is not subjected at all events, and is not liable, it is said, for the costs of the issue (Ph 62. 3 Esp 553. R 152.3.) See 2u. 8 see 3 Esp 25. 2 Camp 333u.) Contra 6 Brining 319.) For the jury may assess joint damages as all defts; and see 1 Day 33.) - Note. Is not the rule as first laid down a departure from principle? Would the party deft be liable for the costs of the issue? If not, still there can be but one assessment of damages, & the rule may go to mitigate them. Suppose he were called to prove property in the other deft, that might defeat any recovery. -

If one of two defts in Ejectment consents to a verdict as himself for so much as he is in possession of, he is a competent witness for the other - Smith (Ph 62.3. Bull 285.) - for a finding in favor of the other cannot benefit him: the damages recoverable being but nominal. -

But a person liable with the deft in a suit, or liable in his head (tho not himself a party) is an incompetent witness to defeat the suit (R 115. 70.) Tho he may testify in support of it. Smith. Stea 55. Ph 364. n. ante 83. -

Thus a partner of deft is not admissible to prove that he is solely liable, and that deft acted as his agent. For the witness who by the supposition is himself liable, and he liable for (at least) half the costs recovered by the Plff. - (R 105. 70. Cas 174. 5 Burr 2727.) and in the second place to indemnify the deft for the whole. - But a release from deft and restore his competency (R 155. 171. 1 Esp. Rep. 103. -

In Eq 2 one of several Defts having no interest may be examined on either side - 228
Ph 63. 3 At 201. Amb 393. 2 Chy cas 214.)

- 22 A Bankrupt is not competent in an action by his assignees to prove property in himself, or a debt due to himself; as increase of his property and assignment his own allowance (Pr 167. Ph. 57. 93. Bull 43. post 133. -

So of his creditors: for by increasing the Bankrupt's divisible fund, the creditor's dividend is increased (Pr 167. Ph 57. Sta 507. 5 Johns 427. 5 Cr 258. 2 Dall 201 Mass 207. 2 Doug 466. Sta 650) indeed the suit is but for the benefit of the creditors -

And the petitioning creditor is not allowed to prove the commission irregularly sued out to support it; as he is obligated by a bond to establish the B. (Ph. 52. n.a. 2 Camp 411. Sta. 4. Mass 237.)

But a creditor who has not proved his debt under the commission is competent to support it, tho' not to increase the fund (Ph 53. 2 Camp 201. 2 Bl Rep 1273. -

New, Leah, & other creditors, as, they being parties to the proceedings, are interested to support the commission (Pr 167. 3 Cas 19.) But their competency may be restored by a release to the assignees. -

23. The Bankrupt himself is not competent to prove any fact necessary to establish the commission: for he is interested in supporting it, as a means of obtaining a discharge from his debts. - Ph 163. 57. Sta 829. 2 H Bl 237. 1 Rep 23. -

So tho' he has obtained his certificate & released his surplus & allowance: for if the commission is not supported, the proceedings under it are void, and he will remain liable for his debts - But in this case, he is competent to increase the fund - for he has no interest in it (Pr 163. 5 Corp 70. 1 Bro. Chy 267.

But he is competent to explain any equivocal act, proved on the part of the assignees by other witnesses, and thus to show that it was not an act of Bankruptcy (Pr 163. 2 Rep 287.) Qu. Upon the principle of necessity?

So to diminish his estate: as to disprove a debt claimed by his assignees as due to him: for his suit is as his interest (Pr 163. 6 Corp 7. a.

24. In Genl, as stated supra, the records being admissible for a or a

229 witness in a future suit, is the criterion of interest in the event (Ph 48. q. 37. R 32. 7ib 62. 2 Johns cas 230. 5th Rep 237. 4ib 302.) = But it is not universally so: - for there are cases in wh a witness is deemed thus interested, tho' the record wd not be read for or as him - in attempt, relating . Thus in *Keppel v. Stiff* by A for taking his goods on execute^r of B. B is not comp^t to prove the property of the goods in himself - for tho' the verdict wd not be read for or as him in attempt, relating to the title, yet his execute^r debt wd be discharged if the *Stiff* prevailed (Ph 47. n. 52. 2 N. Rep 331.) hence an immediate interest in the event. -

So in Ejectment between A & B. B is not comp^t to prove himself the tenant in possession: for tho' the verdict wd not be read for or as him, yet if a recovery were had, he wd be turned out on an exec^r of B. (Ph 48. n. 52. 5 Taunt 183. 1 Johns cas 275. 12 Johns 246.) So that, tho' the record wd not be read, the execute^r wd be enforced as him. -

A devisee is not comp^t to prove the testator's sanity in Ejectment by another devisee in the same will (Ph 51.) See. Why not? independent of the objection arising out of the Stat of Frauds? (Ph 374. xx. Lord Ray 2505. Conn Rep 74. See 1253. 1 Burr 414.) At any rate, this is not an example (as supposed by Ph.) of an interest in the event. -

For other cases of int^{er} in the event when the record wd not be read (at *supra*) see. 1 Ph ⁵⁰ 53.

When the witness has an interest wh is balanced, so that he stands in point of interest indiff^{er}t, he is comp^t to testify for either party (Ph 53. Pe 154. 6ll 129. 4all. 95. 476.) Thus an indistinct wa county for not repairing bridge the inhabitants of the county are comp^t on either side, as to the necessity of repairs - They being interested as well to have suff^{ic}t bridges, as to avoid the expense of repairs (ib. 1 Vent 351. 6 Mod 307.)

So acceptor of a Bill is comp^t in an action as drawer, to prove no effects in his hands, & thus dispense with notice (Pe 154. 1 Esp 33.)

For he is ultimately liable in either event if he has effects. -

So indorser of a note, having rec^d money from the maker to take it up, is competent in a suit by indorser or maker to prove the note satisfied: for he
 11 Tampt 464
 wd be liable in one event to Plff, in the other to the Deft (Ph 55. 2 East 458.)

And the comparative difficulty of the witness enforcing a remedy vs one on the other party (when he has a claim accruing in either event) seems not to affect his competency. C Ph 55. 6. see vide 3 T. R. 579. 2 Bay 399.)

27 In assumption for money paid to the use of ship owner, the Capt is competent to prove that he rec^d the money from Plff for the use of Deft: his liability being no greater in one event than in the other (Ph 53. 102. 7 T. R. 481. n. c. 1 Camp 407. 2 Carnes 77. Pe 165. 9) for if he had rec^d the money & not paid it over he must be liable to one party or the other in any event: and if he has paid it over, he is not liable to either *infra* Parkie 27. -

So in cont for rent when both parties claim under S. S. he is comp^t to prove to whom he made the 1st lease (Ph 54. 3 T. R. 208. 2 Roll 158. Gilt 109.)

So in an action by payee or acceptor of a bill drawn by one of two partners in the name of the firm, either partner is comp^t to prove that the other had no authority to draw the bill (Ph 54. 13 East 175.) for the partner testifying, will be as much exposed to a claim by the payee in one event, as to one by the acceptor in the other (4 Mudd 376.)
 & Selwyn

28 So in assumption between A & B. S. S. who had rec^d from the Plff money due to Plff, was held incompetent to prove that he rec^d it as agent for Plff (Ph 54. 5. 7 T. R. 480. Pe 165. *supra*.) Secus if the witness wd be liable to a greater extent in one event than the other. ex gr. in assumption as acceptor of a bill for the accommodation of drawer, the latter is incompetent to prove the transfer usurious: - for tho' liable in either event for the debt, he is also bound fully to indemnify the acceptor, and of course liable to him for all damages (Ph 55. 4 Tampt 464. ante 115.)

There are certain except cases, in wh a party to a suit is allowed

to testify from a supposed necessity (R 150. Ph 57.) thus, on the stat of Winton (13 Edw 1st usually called the stat of Hues & cny, the Poff, (the party robbed) is comp^t in his action to prove wth the hundred, the robbery and the amt lost, "in default of other proof" (It. 2 Roll 385. Bull 197.) R^{ec}us as to other facts wh^{ch} in common presumption are provable by ~~the~~ other evidence; as, that the place where is within the hundred sued (R 150. 1 Ph. 58. Har 83.) - or that he delivered money &c to his sexton who was robbed (R 150 in 2d qu. & vid R. 157. n. Bull 197.)

And in one action, for malicious prosecute the evi^d gain by deft on the origl prosecute may be proved by others in his defence. Semb. (R 157. n. Ph 58. q. 4 Mod 211. Bull 14.) this rule is also founded on supposed necessity for the protection of prosecutors (ante 20. & ad actioⁿ for mal. pro^{sec}.)

These appear to be the only cases of this description at Com. Law. (R 157. n.) But one or both parties to a suit are in some cases allowed by that Law to testify for themselves: thus by Stat in Conn^{ct} both parties are allowed to testify in book debt, account, and in actions by receivers of counterfeit money or bills. So Poff in cases of secret assault, Bastardy, & prosecute for theft - or to the loss & identity of the property. And so deft is in sci. fa. on a chidgent by foreign attachment - or prosecute upon the stat relating to Trespasses in the night season &c. Sec. 20 81. 8. Stat Conn. 98. 107. 526. 194. 660. 2 Day 116.)

Upon a similar principle of necessity & for the sake of trade & com. 130. more usage of business, Agents or Factors becoming interested in the ordinary or regular course of their employment, are comp^t witnesses for their principals or masters, tho' interested in the event (Ph 94. 5. R 157. 164. 7. 71. ex. qe. A factor may prove a sale of goods for his principal, to charge the vendee, tho' entitled to a commission on the amount (Ph 94. 3. Wil 40. 1. At R 248. 2 H. Bl 670. Bull 289. 1 Johns cas 408. 2 B 60. 2 Johns rep 189. R 165.)

And in fact any one who contracts for another, under a proper authority, is an agent within the rule (Ph 94. 2 H. 186. 591. —) 252

So of the Reward of a man who interested to support a claim by the lord. (Ph 92. 3 Kell 90. Hand 360.) So an agent is comp't to prove in favor of his principal a payment of money, delivery of goods &c, tho' his ev'd goes to discharge his own liability to the principal (R 157. 2. 164. 5. Cas 129. Bull N. P. 284. Ph 94. 11. Mod 262. 4 T. R. 589. 90. 2 Esp 579. 3 it 48. Sal R 289. Sta 647.)

So if the agent has overpaid money, or paid by mistake, he is comp't to prove the fact in an action by the master to recover it back. (Ph 95. Sta 647. 3 Camp 146. R 164. 2 Johns ev'd 270.)

31 Sec'd as to the acts of a servant not done in the ordinary or regular course of his employment, and claimed to be violations of trust or duty. — These are not within the reason or principle of the rule (Ph 95. 6. Bull 289.) or in an action to recover back money paid for illegal purposes, a squandered by Plff's servant — servant not comp't to support the action without a release by the master — for the act is not in the regular course of his employment, and if no recovery is had, he is liable to the master. (Ph 95. 6. R 164. n.)

So in an action vs a master for an injury done by the negligence of his servant, the latter is not a competent witness for his master: for he is liable to indemnify his master, if Plff prevails; the reason of the genl rule does not apply in this case (R 165. 6. n. Sta 650. Lo Rayn 1411. 4 T. R. 589. 1 Esp 339. 6 it 72. 1 Corp 257.) Competency restored by a release. R 166. Sta 1083. R cases 53. post 138. —

So in an action for striking Plff's Goods on ship board, the master is not a witness for Plff without a release from Plff — for he is interested in the result, and his ev'd sh'd not be to prove an act of his own, in the ordinary course of his employment (R 166. cas 53. 84.)

So in an action for policy of insurance, for barratry of the Master, he is not admissible for deft unless released by them (R 166. 1 Esp. cas 339. ante 115.)

An agent, when exempt to testify, is so to prove his own authority (Phy. n. a. 132. 2 Dall 300.) But he cannot prove the contents of a written authority without producing it. *Sumb.* Ph. 2 Dall 245. 1 Esp 406 n. 1. 1 Mass 483. ante 8. 79.)

For can one who has purchased goods in his own name testify (for value) that he purchased them as agent for deft? for being personally bound by the terms of the contract, he must pay if deft is not subjected. * note the analogy to the case of a dormant partner (Phy 5 n. 3 Corp 317.)

It was once holden that if a witness supposed himself under an honorary obligation, tho' not a legal one, to indemnify a party, he was incompetent to testify for that party (Pr 157. Sta 129. Ph 41. 2. 1 Mc N 140. Esp 707.) But this rule has since been denied & seems not to be law. Ph. 141. 2. 9 Johns 249. 1 Camp 145. But it may go to his credit. — See vide 5 Mass rep 518. 8 Johns 428. 1 Bull 62. 2 L. 50. 1 Count 147. 5 Roll rep 344 n. Ph 440. —

The witness is excluded, a witness must have existence at the time it is said, when the act or fact in question took place, or have accrued afterwards by operation of law, or by the act of the party who offers him as a witness (Pr 157. 185.)

For an int subsequently acquired by the witness's own act (without the concurrence of the party) does not, as it has been said, disqualify him — Otherwise a witness might in every case deprive the party of his testimony, & the opposite party might sometimes do it (Pr 158. 185. *Rin* 586. 3 T. R. 27. 33. 4. 7. 3 Johns cas 237. *Phil* 100. *Sta* 486. 3 Conn Rep 266.)

Thus if a witness to a bond or other contract make a lib that the party claiming will recover in the action founded upon it, he is still a competent witness for Plff, and compellable to testify (Pr 158. Bull 290. *Phil* 100. *Rin* 586.)

So if a prosecutor or other person, privy to the commission of a crime by another, lays a wager that he will be convicted, the former is competent and compellable to testify in support of the prosecu^r (ib), *Sta* 652.

So when a Broker having procured B to underwrite a policy afterwards became underwriter himself, A was holden by Jos Kemper & Ashurst Judges, that B could not thus be deprived of A's testimony, even if the latter had become interested in the event: 3 T. R 27. Ph 100. 3 Camp 380. contra sem. See Du. whether the rule is not laid down too generally, & whether the principle in the last case is law, & indeed whether the rule extends to any other case, than those in which the act creating the risk is either fraudulent, i.e. intended to deprive the party of testimony, or merely gratuitous and idle: as in the above cases of wages (Ph 101. 2. 1 M. & Selw 9. 3 Camp 380. For if a person acquainted with a transaction in which others are interested, afterwards in the regular course of business, & bona fide, becomes interested in the event of the suit arising out of it, he is according to the latest determinations, incompetent: thus when one underwriter who has paid the loss, upon an agreement that the insured should refund, if his action or another underwriter failed, was called to prove as a witness that the policy was void: the Ct held him incompetent (Ph 101. 2. 5 it)

But when a person having given a deposition while uninterested afterwards becomes interested; by operation of law, his deposition is admissible. 2 Ves 42. ante 68. post 139.)

So if he afterwards becomes a party, as heir or Ex'r to the right party (2 Ves 699. 1 P Wms 289. 2 Atk 615.) contra if he becomes a party. See 286. Sta. 101. Esp 75. 6.

But in these cases the depositions were "in perpetuum rei memoriam", to be used only after his death, & he was alive. See Du. whether in these cases, the depositions were not admissible, as the witness was uninterested at the time of swearing (ante 68. b. by J. H.)

And on the other hand in those cases in which a witness cannot by acquiring a subject interest deprive a party of his testimony, he cannot by acquiring an opposite interest privilege himself from testifying. ex. gr. If a subscribing witness to an obligation, becomes bail for the debtor or party

found, he is still compellable to testify to its execution (R 185.)

But when a person who becomes interested by giving bail for a party, afterwards comes to the knowledge of facts advantageous to the other party, he is not compellable to testify to such facts: as this would tend to subject him on his own bond, and his interest was antecedent to his knowledge of the facts in question. (Ph 101. 2 Rost 406.) Not Law. & G. - liability incurred is only civil.

But when a subject interest in the event is cast upon the witness by operation of Law, he is incompetent to testify in support of his interest, and not compellable to testify as it. ex. an heir apparent who being coexecutor of facts relating to his ancestor's title, afterwards succeeds to the inheritance: so an attesting witness to a bond who afterwards is appointed administrator to obligee or obligor. (Ph 362. 3. n. 1 P. Wms 289. 2 term 699. Sta 34. 52 R 372. Esp. 210. 12 East 183. 3 East 7.) ante 82. 117. -

So if the interest accrued by the act or concurrence of the party offering the witness - ex. witness to a joint bond becomes bail to obligee, can't testify for him: or a subscribing witness becomes husband or wife to one of the parties (R. 157. 135. 3 Johns cas 237. 2 East 183. ante 82. -

Recapitulation. 1. But subject by operation of Law, disqualifies on the one side & privileges on the other. 2^d By act of party offering disqualifies - 3^d By act of opposite party still competent. 4th By act of witness without concurrence of either party, if the act is done in the regular course of business, it disqualifies. Recd. if fraudulent or an unnecessary, wanton, transaction or a rago. -

As a general rule, the witness goes to the competence, must also continue till the time of trial: hence the removal of it before the time regularly restores the competence of a witness. (R. 158. Doug 139. Ph 97. 8. 1 Johns cas 170. Rep. 8 it 377. 1 Mass 73.) 84. Will attested by legatee who releases it: he is competent to prove the will. (R 109. Ph 97. 8. bin. abr. 20. 14. n. 53. 1 Burr 423. 7. 4 Burr C. L. 97. Sta 1203. Por. Dec.)

as to devise thus releasing, opinions contra by Lee & Campen. ch. J. Ph. 97. n. Sta 1202.)
 Port D 124. 34. 1849 4th n. Upon the construction of the stat of fraud. Port the
 weight of authority in D. C. judgment in support of the rule. (Ph 97. Dec 29. 33.)

And now by stat 25 Geo 2 ch 6. the legacy a devise to a subscribing
 witness is declared void, and the witness comp^t to prove the will as to the
 residue (Port D. 122. 3. Pr 160 n.) This stat being declaratory, is in affi-
 rmance of the rule (Port D. 129.)

The stat makes the same provision as to Legates who have been paid
 or have released or refused payment on tender (Port D. 123.)

By the same stat creditors to Testator being subscribing witnesses are de-
 clared comp^t, tho' their debts are charged by the will on lands. (Port D. 122. 3. 133. 4.)

We have a similar stat as to devisees & Legates (in wills) executed after
 Jan'y 1. 1803. provided the instrument is not otherwise sufficiently attested:
 in wh case the Devise a legacy will be good; and provided also the Devise a
 legacy is not given to an heir at Law of the Testator: if given to an heir
 he cannot testify in support of the will, and of course all the dispositions
 in it of real estate are void, unless it is suff^t attested with his
 name (stat of 1803. 683.) The object of this exception is to protect heirs
 who are witnesses vs the loss of their patrimony. -

By the Eng^l stat supra, a subscribing witness being a Legatee who
 dies before Testator, or before recovering or releasing the legacy is a legal at-
 testing witness. (Pr 160 n.) Proof of his attestation made as in other cases
 when a subscribing witness is dead. -

It follows from the last genl rule, that a release to a from an interested
 witness as the nature of the case may require, or any other means by
 wh he is divested of interest at the time of examination will restore his com-
 petency. (Ph 97. 8. Pr 158. Doug 139. post 149. -)

Thus in the case of forgery, if the person whom the instrument purport
 to bind has been released by the party who wd be entitled to recover upon

or enforce it if genuine, he is comp't to prove the forgery (Ph 98. 1 Leach 178. 184. 255. Pt 169. n. 2.) So if the latter party has before set aside the forged instrument by a judgment of a Ct. (Bull 289. Pt 169. ante 110.)

So in an action by an indorsee of a note or maker; an indorsee being released is a comp't witness for Pt (Mass 173. Ph 97.)

So a servant for whose neglect the master is sued, may on being released testify for him (Pt 166. Cas 53. Sta 183. Ph 95. b. ante 131.)

So a Bankrupt who has obtained his certificate, and given his release to his assignees may testify for them to prove property in himself, and thus increase the fund (Ph 98. 37. Pt 169. Bull 43. 2 J. R 497. ante 122.) - But not to support the commission. ante 123. -

As to members of corporations suing or sued vide ante 118.

And when a release, payment &c to a person a witness, wd if accepted rec. 139 store his competency a tender of it on the one side, tho' refused on the other will have the same effect (Ph 49. Pra 158. Doug 137. 3 J. R 35. 2 Ashm 176.) Thus if a legatee or devisee being a subscribing witness to a will tenders a release wh. is refused, he is comp't to prove the will, or if payment of the legacy has been tendered to him and he has refused, he is competent & compellable to testify. (Ph 98. Pt 158. q. n. Doug 137. 3 J. R 35. Bull 459. 17.)

So doubtless a servant for whose negligence the master is sued, is compellable to testify for the master, upon a release tendered by the master tho' refused (Pt 158.) C. ly. J. G. So of a bondman for a prosecution if a release is tendered him by Dept. -

But if a person gives a deposition while interested in the event, and his int. is afterwards removed, the deposition is not admissible: for at the time of his testifying, he is under the bias of int. (Ph 97. n. 1. Cam. R. 14. 3 Brim 311.) e. g. a deft's bail gives a dep't in his favor, and the bail is afterwards changed. -

A person is always compelt to testify as his interest; tho' it is said not in good compeltion 238
like to do so. (Pe 160. 184. Salk 691. ante 34. Lo Ray 1008. Sta 400. Doug 572. 7 T.R. 176.

Persons are in some cases in compelt witness by reason of the relation in
41 wh they stand to one of the parties; thus Husband & wife are according to the genl
rule in compelt for or vs each other. (Pe 172. 3. Ph 63. 4. Co Litt 60. Bull 286.
Gill 119. 2 Hawk. c. 46. 570. 1 Black 443. 4 T.R. 678. ante 15. vid. Husband & wife 52.

For the particular rules & distinctions under this head vid. the Husband &
wife 52. b. Parent & Child 75. ante 15. —

Persons living as Husband & wife may upon the question as to the legitimacy
of their issue be admitted as witnesses; but with respect to the facts wh
they are compelt to prove, see references *supra*, & Pe 182. Ph 180. 6 T.R. 330.)

Counsellors, Attorneys & Solicitors are neither compellable nor per-
mitted to swear to confidential communications made by clients in re-
lation to suits pending, or in contemplation. (Pe 176. 7. Ph 103. 4. 10 Mees
40. 1. Vent 197. Bull 284. 4 T.R. 432. 753.) Nor is either of them compellable
to produce a paper committed to him by a client in another cause. (Ph 103. n.
& Mass 370. 3 Bay 444.)

So tho' the suit in controversy to wh the communications relate is at an end, 184. 895.
a tho' the counsellor &c has been dismissed (Pe 178. Ph 103. 4 T.R. 757. 60. 2 Camp 578.

Nor can he testify in one case as to facts thus disclosed in another suit
between other parties (ib). These rules are founded on the privilege wh of
the counsel &c but of the client; and the obligation of secrecy &c never ceases. —
Ph 103. 124p 695. 4 T.R. 759.) —

The same rules as to an interpreter between the party & his counsel &c.
3 be being the organ of communication between them, is under the
same obligation of secrecy. (Ph 103. Pe 178. cas 77. 8. 4 T.R. 756.)

But this privilege of the client is confined to such communications
as are made respecting professional business; and during the relation
of Atty & client. (3 Johns cas 198. 1 Mc. N. 241. 1 Cam's rep 157. —)

239 Hence an Atty &c by profession, but not retained as such, is not within the rule, tho he may have been consulted confidentially; for in such a case the relation does not exist (Ph 103. R 470. 4 T. R. 703. 60.) -

If the client waives his privilege the Atty &c is allowed & compellable to testify (Ph 103.) But the person who was confidentially consulted upon the supposition of his being an Atty, when he was not, has been holden compellable to testify to the disclosures made to him. - (Ph. 103. 6 Esp 113.) See Lic.

And propositions made by an Atty authorized to make them to the adverse party, may be proved by a third person who heard them, tho not by the Atty himself (Ph 103. 4. 2 Camp 10.) - for the privilege extends only to the three cases of Atty, Counsel & Solicitor. - 143

Hence Physicians & Surgeons are compellable to disclose information acquired in their professional characters. (R 104. 4 T. R. 707. R. cas 77.)

So of a Priest to whom confession has been made, according to the practice of the Roman Catholic Church. (R 180. cas 77. Ph 105 n. 1 Mc R 253.) So, a fortiori, of a private confidential friend to whom disclosures have been made under an injunction of secrecy. - R. R. 180. Ph 104. cas 77. See Bull 294. -)

And it has been ruled that a clerk to commissioners of a tax, who had taken an oath of office not to disclose what he should learn as clerk, was compellable to disclose on the ground that in such an oath there is an implied exception as to what required in Acts of Justice. - or in other words, that it extends only to voluntary & extrajudicial disclosures. (Ph 104. 64. 3 Camp 337. -)

And an Atty &c to a party in a cause may be examined as his client as to facts known to him before he was retained; or addressed as such: - for as he does not in such case acquire his knowledge by the relation of his client the disclosure violates no professional 144

confidence (Ph 105. 1 Vent 197. 10 Mod 40. Bull 284. 4 T.R 759. 168 63. 2 L. 110.) 240

So when he has attested an instrument to wh his client is a party he may be examined as to the exactness of it: for the act of attestation is not done by him as Atty but as a witness selected by the parties. (Ph 105. Pr 173. 9. cas 108. 5 Esp. 52. Comf 840. 6. 4 Esp 285.) —

So if he was present when his client swore to an answer in Chy, he may be examined as to the fact of the latter's swearing, or an indictment for perjury: for the fact is not one communicated to him in confidence. —

So in genl as to any collateral fact wh he knew, or might have known without any instruction from his client (Pr 105. Bull 284.) as in relation to the fact of an occasion in a deed to wh his client is interested, and when his knowledge is not derived from any disclosure by his client. (Ph 105. 1 Vent 197. Bull 284.) So as to the contents of a written notice, recd from the adverse party. (Ph 105. East 357.) So in debt on bond Plff's atty, has been admitted to prove, from his own knowledge that the bond was uterious (Ph 105. Pr cas 108. —

40 So, when after an action on a promissory note had been compromised, the Plff informed his Atty that the note had been given without consideration, it was held that the Atty was compellable to disclose the fact: for as Atty in the suit, he was then *functus officio*. (Ph 105. 6. 4 T.R 432. Pr 179. —

And an Atty is compellable to disclose whether a note put into his hands for collection was endorsed a not (Ph 105. n. a. 1 Cam 258.)

If an Atty undergoes a witness on trial, & the witness in a subsequent cause varies from his answers given to such interrogations, the adverse party in the latter suit, may call on the Atty to discredit the witness by testifying to his former answers (Pr 179. 11 St. p. 253.) for in this and all the preceding cases of exceptions to the genl knowledge, the Atty does not gain his knowledge from the relation of the client, and therefore violates no professional confidence. — (Pr 178. —)

It has been resolved that a person who has put his name to an instrument to give a sanction to it, is not admissible as a witness to invalidate - being considered as precluded by a species of Estoppel (1 T. R. 296.) The rule appears to have been first adopted in the case cited (Watson vs Shelly, Ph 38. R. 181. 3 Burr 1244. 1 Bl. R. 365.) Soon after the same rule was recognized in a limited extent, viz, as applying to negotiable instruments only. (3 T. R. 34. R. cas. c. 40. 1 Esp. 298. Ph 34. n.) Ex gr. in an action by an indorser vs acceptor of a bill - the indorser was holden incompetent to invalidate the instrument, as by proving industry &c. Note, according to even these cases, however, he is competent to prove subject facts wh do not render it originally void, as payment. (Ph 42. R. 652. 3 Mass 27. 11 Johns 128. Chitt B. 284. 7 Mass 440.)

But in the case of *Cladan vs Lashbrook* the rule was denied and the former cases overruled (6 T. R. 601. R. cas 117. 1 Esp 171. Swift 96. 105. 6 T. R. 464.)

In several of the U. S. the rule as limited above to negotiable instruments has been recognized. (2 Dall 194. 1 Day 17. 301. 1 Cain 208. 6 Y. 3 Mass 27. 585. 2 Johns 165. 4 Mass 157. 576. 6 T. 449. 7 T. 199.)

In Court the rule in *Lord vs L.* has been finally adopted by the Ct of Errors (1 Court Rep 280.) and as I b. conceive, very correctly, - as the objection to it go rather to the proof of the fact at all, than to the incompetency of the witness. -

Examination of Witnesses.

Objections to the competency of witnesses must be taken before examining him before he is sworn in chief upon the "voir dire", by the testimony of the other witnesses swearing to the fact wh renders him incompetent, & upon his own examination when sworn in chief (R. 186. Ph 90. 56. R. 201. 10 Mass 193. 1 T. R. 719.) formerly the objection ed be taken only in one of the two first modes; after he was sworn in chief, the objection was too late. (it.)

But as the practice now is, the objection may be taken after he has been sworn & examined in chief; and indeed when it is discovered, at any time

during the trial that he is incompetent, he may be rejected - (Pr 186.7. Ph 196.1 D.R. 47. 1 Esp 37. Ph 204.5.) So in Chy, 2 Vern 463. 1 Chlms 523. Ph 204. -

The mere fact that a witness is discovered after trial to have been incompetent is not sufficient ground for a new trial, tho' it may have some weight in connection with other facts (Pr 187. 1 D.R. 719. vide New Trials. -

Upon the "voir dire" no question is proper but such as go to the competency of the witness; such as relate merely to his credit are inadmissible under that oath. The sole object of examining a witness under it being to exclude him - (1 McT 147. 200.)

149. Upon his examination under the voir dire, a witness may be interrogated concerning instruments executed by him, or other papers wh create an interest in him, without producing them; for the party objecting is supposed not to know what witness will be called as him, and of course not to be prepared with evidence of his incompetency (Pr 187. Sw. 110. 2 Starkie 433.)

An objection arising from witnesses answer upon the voir dire may be removed by other answers upon the same oath. (Ph 96.) and the last rule holds as well in the latter case as in the former. Hence if upon the voir dire a witness confess himself to be interested, he may restore his competency by his own testimony under the same oath, without producing the records by wh his interest has been extinguished. viz. that he has become Bankrupt & rec'd his certificate: also, that tho' formerly a member of a corporate wh is a party he has been disfranchised &c. (Pr 187. 1 Rost 226.7. Ph 97. Peas 218. 1 Esp 162. 4. 15. East 57. ante 137.) = for as the party objecting makes the witness his own for this purpose, he cannot object to such answers as operate as himself. and the objection raised by the testimony of the witness himself may be removed by his testimony. -

+ Rec'd if his original int is proved by other witnesses: in this case the certificate &c must be produced to restore his competency: - here the party objecting does not make the witness his own (Pr 187.)

If a release is given to a witness for the purpose of restoring his competency

243 It must be produced (Pr 187.) Qu. if the interest is disclosed by himself on the voir dire. The declaration of the witness himself before trial, that he is interested, is not said to exclude him. If it were, he might by a false hood without oath, wrongfully deprive a party of his testimony, without liability for the false hood (Ph 96. n. 5. Mass. 261.) But proof of such a declaration made by the party offering his testimony, will exclude him (8 Mass 487.)

If the party objecting to a witness, examine him upon the voir dire, he is bound by his election, & cannot afterwards call other witnesses to prove his incompetency⁷. And the rule holds in converso. (Ph 97. n. 2. Ball 272. Mass 219. Peck 186. 10 Mod 193.) ⁷Note. The rule is the same, when a witness has been examined as to his interest under the general oath; and it applies also, to depositions taken before a magistrate (3 Day 214.)

In the former case however, the party may introduce other evidence to prove his interest, to discredit, tho' not to exclude him (Pr 186.)

Attendance of Witnesses how Compelled.

The ordinary mode of compelling attendance of witnesses in civil cases, is by writ of "subpoena ad testificandum" (Pr 191. Ph 3.) and if the witness is in any possession of any deed or writing, wh. is thought necessary at the time, he may be compelled, by a special clause in the writ, called a "duces tecum" to bring it into Ct. The writ is then called a "subpoena duces tecum" (Pr 191. Ph 12.)

But tho' the witness is bound unconditionally to bring the writing into Ct, the question whether the party is entitled to have it read in evidence may still be submitted to the Judge (Ph 12. 9 East 485. 1 Esp 405. 14 Johns 391.)

And the witness is never compellable to shew any writing, wh. is evidence of his own title, or wh. wd subject himself to any claim: - as no one is bound to furnish evidence as himself, or to expose his own private writings for the benefit of strangers. (Pr 191. 7. it appx. 38. 9. 1 Esp cas. 405. 414. 43. ante 80.)

As to the mode of serving the subpoena in Eng^d vid Pr. 92. Ph 4. 5 Mod 355. -

in Court it is served either by reading a certified copy left with the witness &c.

It must be served in a reasonable time - no precise period fixed (Pt 192. Sta 570. 2 Edw 809.)
 52. In Eng^d the writ issues from the Ct before wh the witness is required to appear. -
 In Conn, it may be issued either by the Ct in wh be, or by a magistrate, or justice
 of the peace, or assistant be. (Swift 105. St Conn 184.) -

A witness tho subpoenaed is not bound to attend in civil cases, unless a reasonable sum to defray his expenses, in going to, remaining at, & returning from the place of trial, is tendered to him, or unless he waives it (Pt 192. Sta 1150. Ph 3.)

If after due service, and tender of a reasonable sum for his expenses, the witness neglects to appear, he is liable to an action on the case (Doug 544) for damages - to an attachment for contempt - or to an action on St 5 Eliz in Eng^d (and in Conn a similar st.) for a penalty, and also, for a "further recompense" given by these stats - both to be recovered by the party grieved (Pt 192.

Doug 535. 556. Ph 4. (Sta 570. 2d 810. 1054. 1150. Corp 846. St Conn 185.
 3 Burr 1329. Cro Car 522. Comb 449.) -

In Eng^d however, the action for further recompense under the stat of Eliz. will not lie unless the amt has been previously ascertained by the Ct out of wh the process is issued - But assessment being made debt will lie for it. (Ph 4.
 Doug 535. 61.) Note. the stat Eliz expressly refers the assessment to the discretion of the Judges of the Ct out of wh the process issued; tho this is construed to mean the Ct out of wh - not the sledge. (Ph 2. Doug 505. 35. 40.)

This rule I. G. trusts does not obtain in Conn. The provision of our stat as to further recompense being very diff't from that of the Eng^d. providing for a recovery by action, bill, plaint or information &c. (St Conn. 685.)

But the more usual mode of proceeding in Eng^d is by attachment. (Ph 5 Sta 1054. St 108.) under wh the witness may be fined for contempt, and imprisoned till he pays not only the fine but the damages sustained by the party. (Corrw 108. 68. Doug 540.)

53. In Conn, if a witness after due service & tender neglect to appear, a capias may issue to bring him before the Ct to testify. - (But this pro-

being is not, like the Eng^l attachment, the means of pecuniary recompence to the party. The course of proceeding by attachment for this purpose, has not been in use here, tho' there is no legal impediment to its being introduced. - Nor is the rule the same if he attended whether called to testify or not?.

If a person wanted as a witness is in custody under unlawful authority, or serving on board a public ship, under an officer who refuses to allow his attendance, a subpoena being ineffectual, the process to compel attendance is a writ of "habeas corpus ad testificandum". By this process he is kept in custody, and returned to his former situation (R 193. 3 Ph 9. For 396. Comp 172. 3 Burr 440.) -

If the witness wanted is a prisoner of war, the writ will not issue without the consent of the executive government; that is of a Sec^y of State; as he is subject to the orders of the Executive authority. - (R 193. Ph 10. Doug 419.) In such case however, he may by consent, be examined upon interrogations without being brought up. -

So in Eng^l if in custody on charge of high treason (R 193. -)

In civil cases witnesses may be compelled to appear either by subpoena or by being bound in a recognisance to appear. If they refuse to enter into such recognisance they may be committed for contempt. (Ph 7. 2 Hale P.C. 201.)

In civil cases the party accused of a crime is also entitled to a subpoena. For the provisions in his favor by the Eng^l Law vid Ph 7. 2 Hawk 46. 19.)

In civil cases, witnesses are bound to appear for the public without any previous tender of money for their expenses; and by the com Law there is no provision for reimbursing them (Ph 8.) But now otherwise by stat 27 Geo 2^d and 18 Geo 3^d. (ib.) -

The person of a witness attending trial of a civil is protected from arrest in civil process; and this protection covers the time of his going to, attending at, & returning from the place of Trial (R 193. Ph 56. DC R 1113. notable example)

And in genl a subpoena is not necessary for his protection; if he attended

upon a private request he is within the privilege. (Ph 566. 8 T. R 526. Contra 6 Mass 264. Ph 6. n. b. 7 Johns 538.) -

Same rule holds of a witness attending from another state, tho' his attendance is not be compelled. (2 Johns 294. Ph 61.) This principle has been extended to party attending an arbitration under an order of N. P. (Pr 193. Ph. 6.)

A reasonable time is allowed him for going to the place of trial and returning. - and in determining what is a reasonable time the practice of Ct is liberal (Pr 193. Ph 6. 2 Pol 113. Sta 986. 13 East 16. a. 4 Dall 329.) -

If arrested in violation of his privilege the Ct on wh he is attending, will on motion discharge him. (Pr 193.) the usual practice in Court is to obtain a written protection from the Ct; but this is unnecessary, tho' convenient as furnishing ev^d of the privilege to officers. -

Depositions. - In Eng^d, where a material witness resides abroad, he may under an order of the Court, & in vacation, of a Judge, be examined de bene esse, upon interrogatories before commissioners. But this it seems is not done without consent of both parties (Ph 10. 372. 2 Pr 60. 2 Tidd 812.)

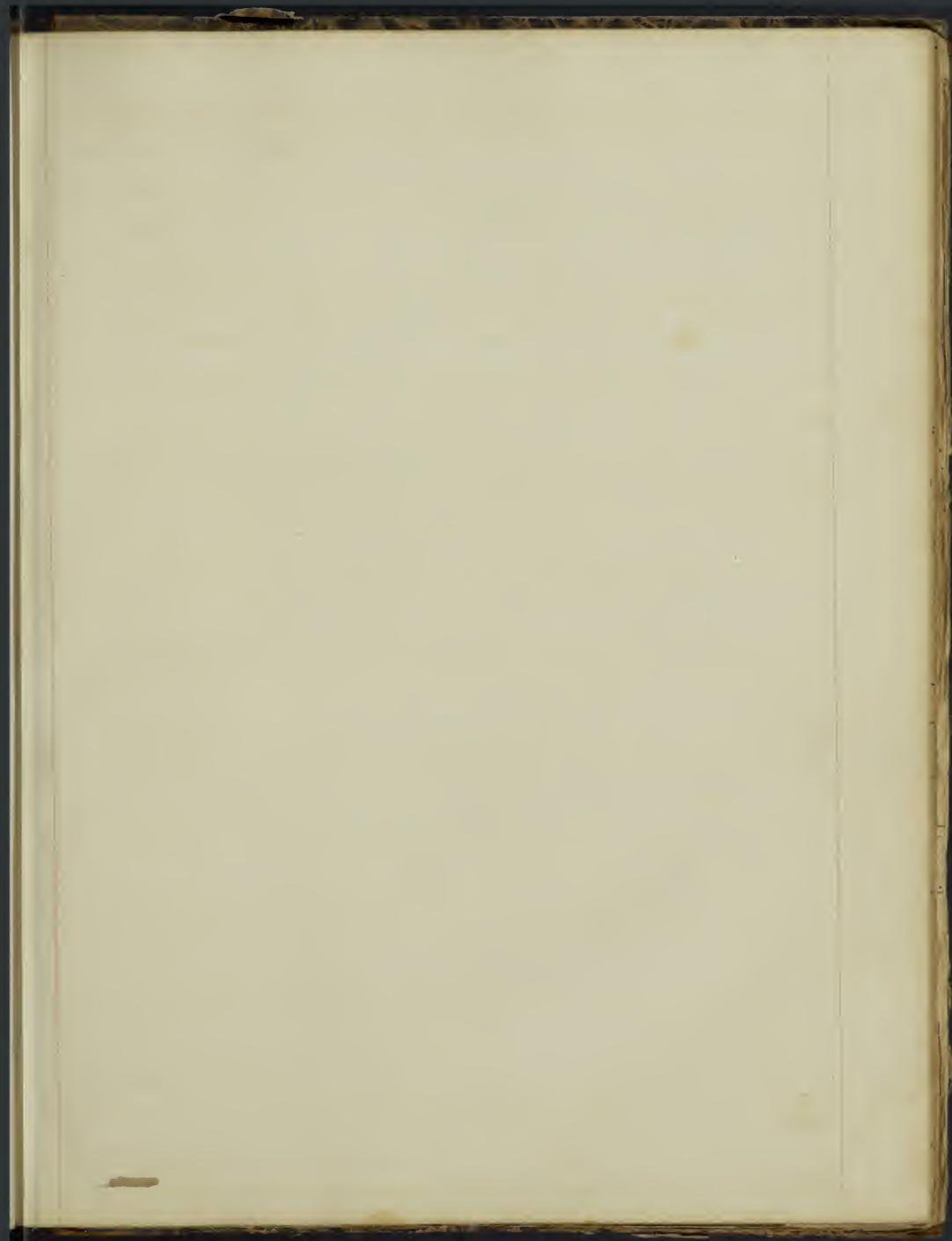
In Court this proceeding is never necessary; tho' provided for by stat.

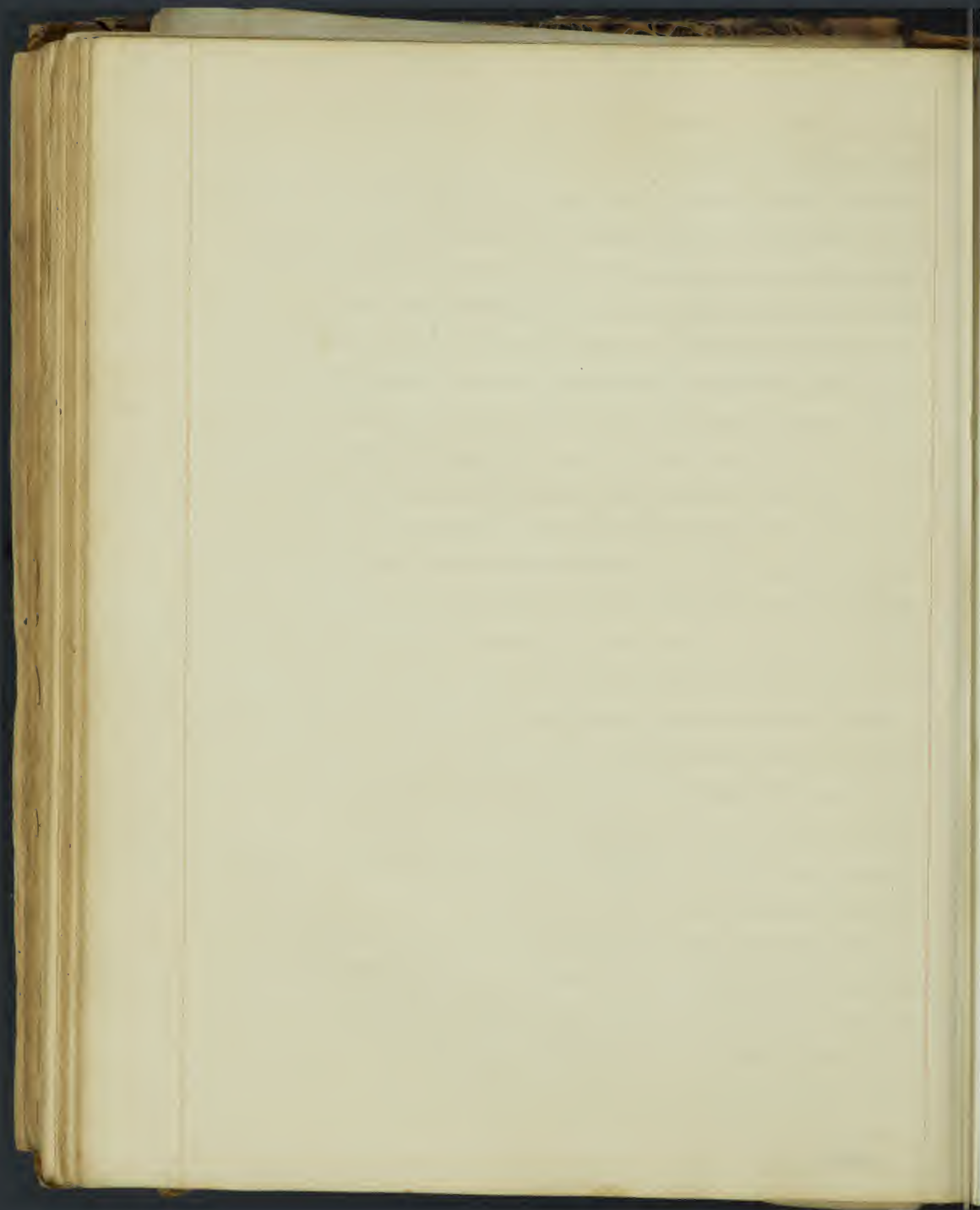
So if a witness is about to leave the country. &c. And if at the time of the trial the witness has left the country, & is not of it, the deposition so taken may be read in ev^d (Ph 272. Tal R 642. 1 Carr 172. 6 Esp 12. 1 Johns cases 102. 147.) Rec^d if he is in the country at the time of trial (Ph 172.) -

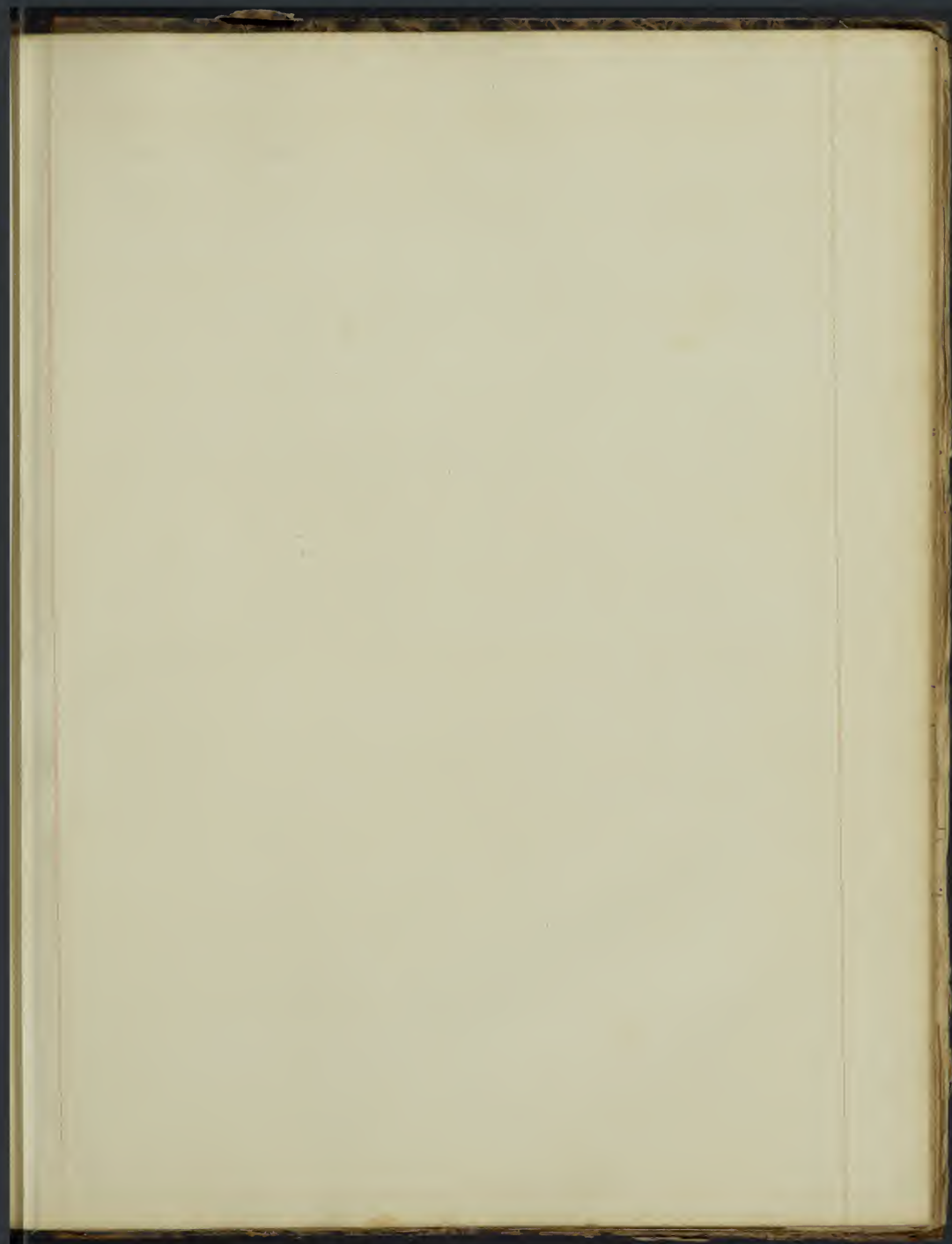
If the opposite party will not consent to the examⁿ the Ct will put off the trial: - that the party applying may file a bill in Eq^{ty} (p. 68.) until consent is obtained, or the witness comes into the country (Ph 10. Doug 419. Corp 174. 1 Boss & R 211.)

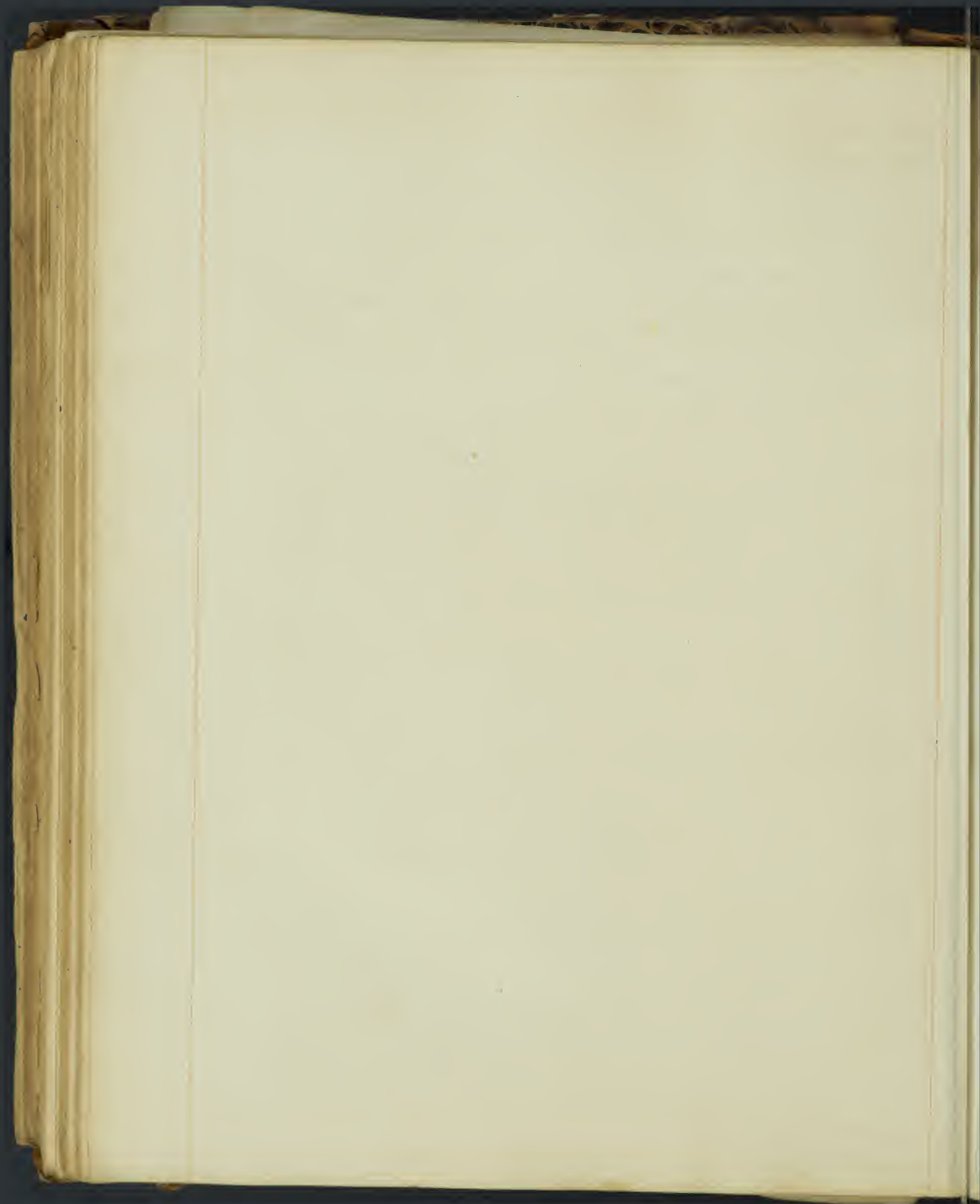
But this will not be done to enable the party to set up an odious defence, as that Plff is his slave, or an alien enemy &c. (Ph 11. 1 B & P 452.)

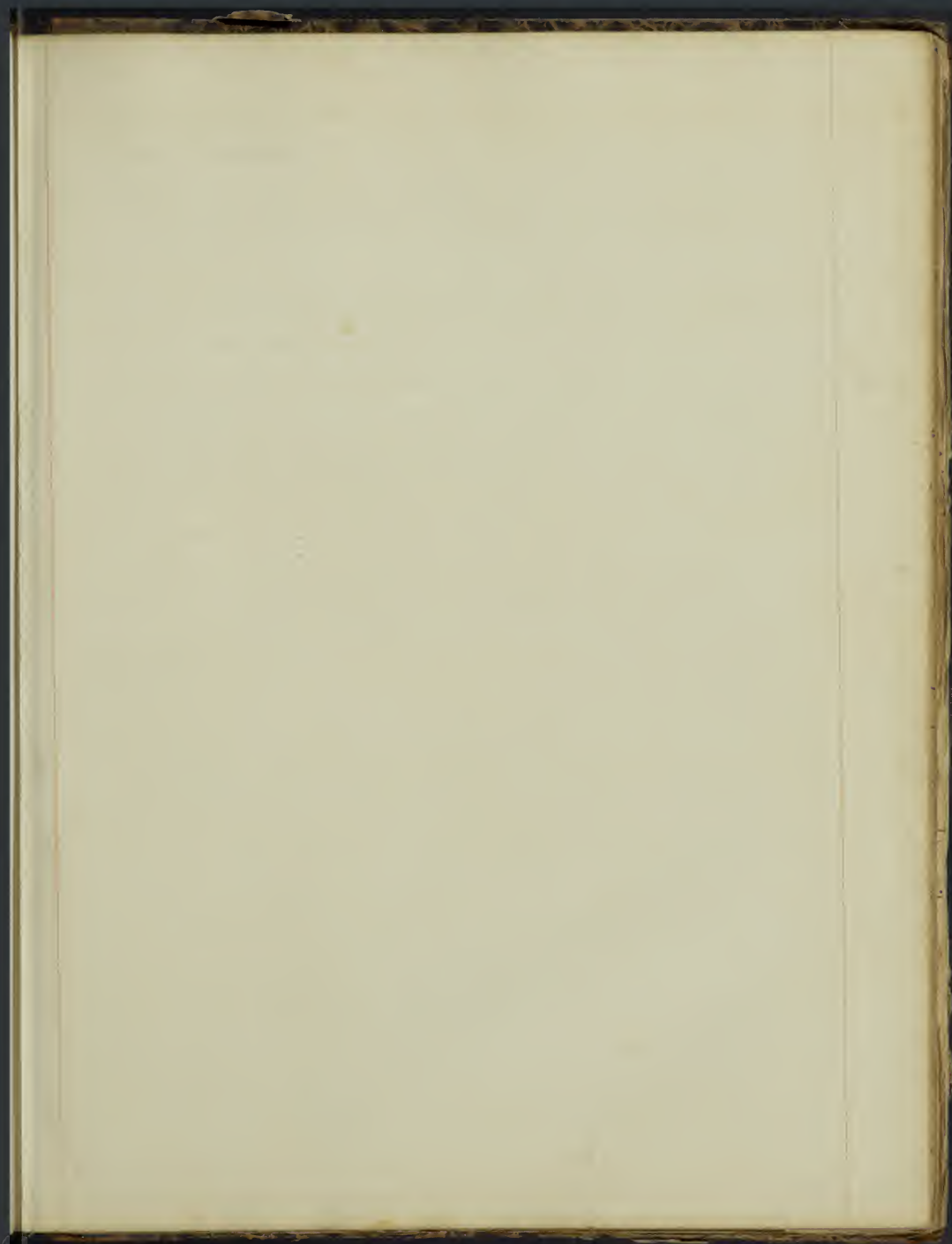
Finis coronat opus. Shakespeare -

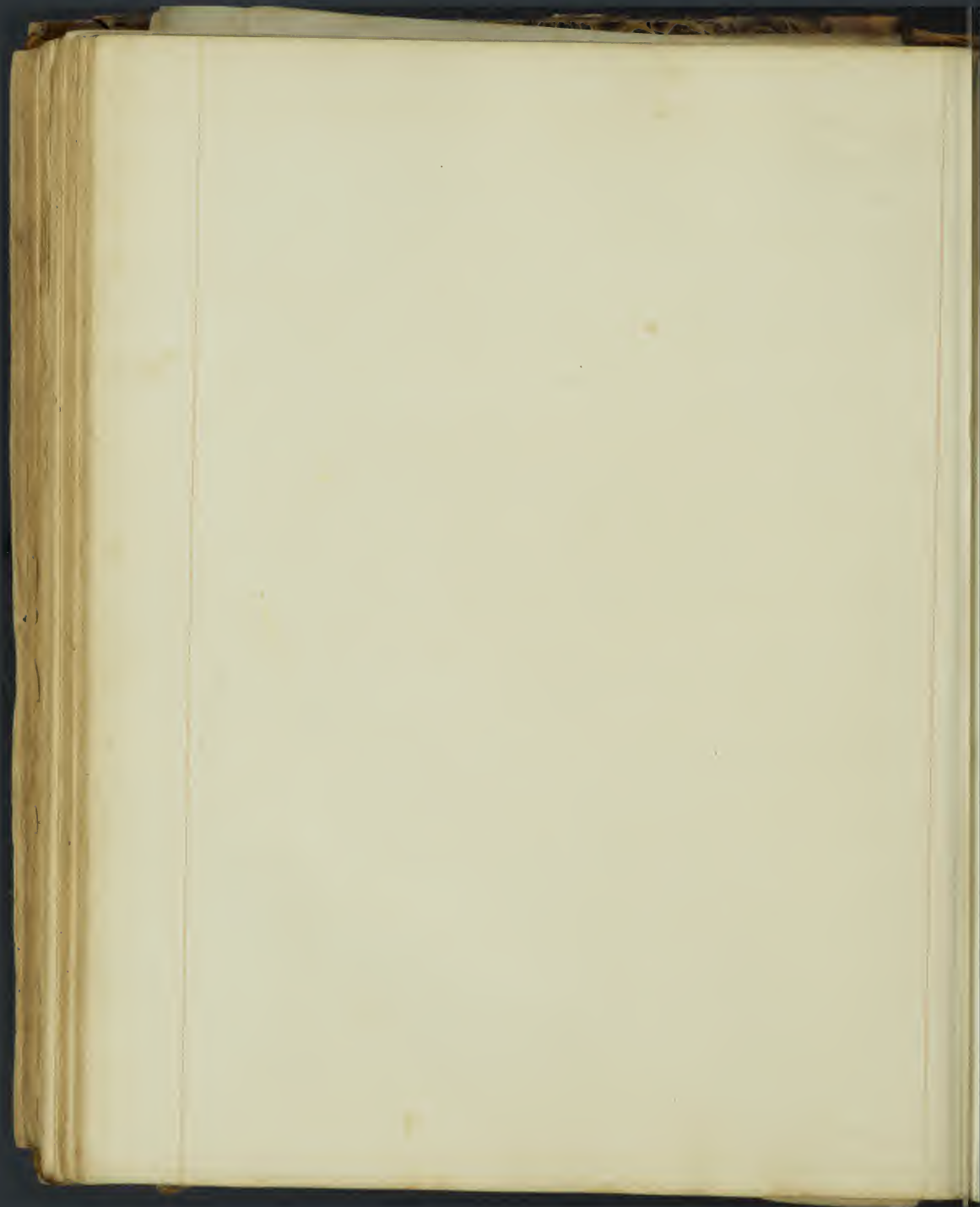


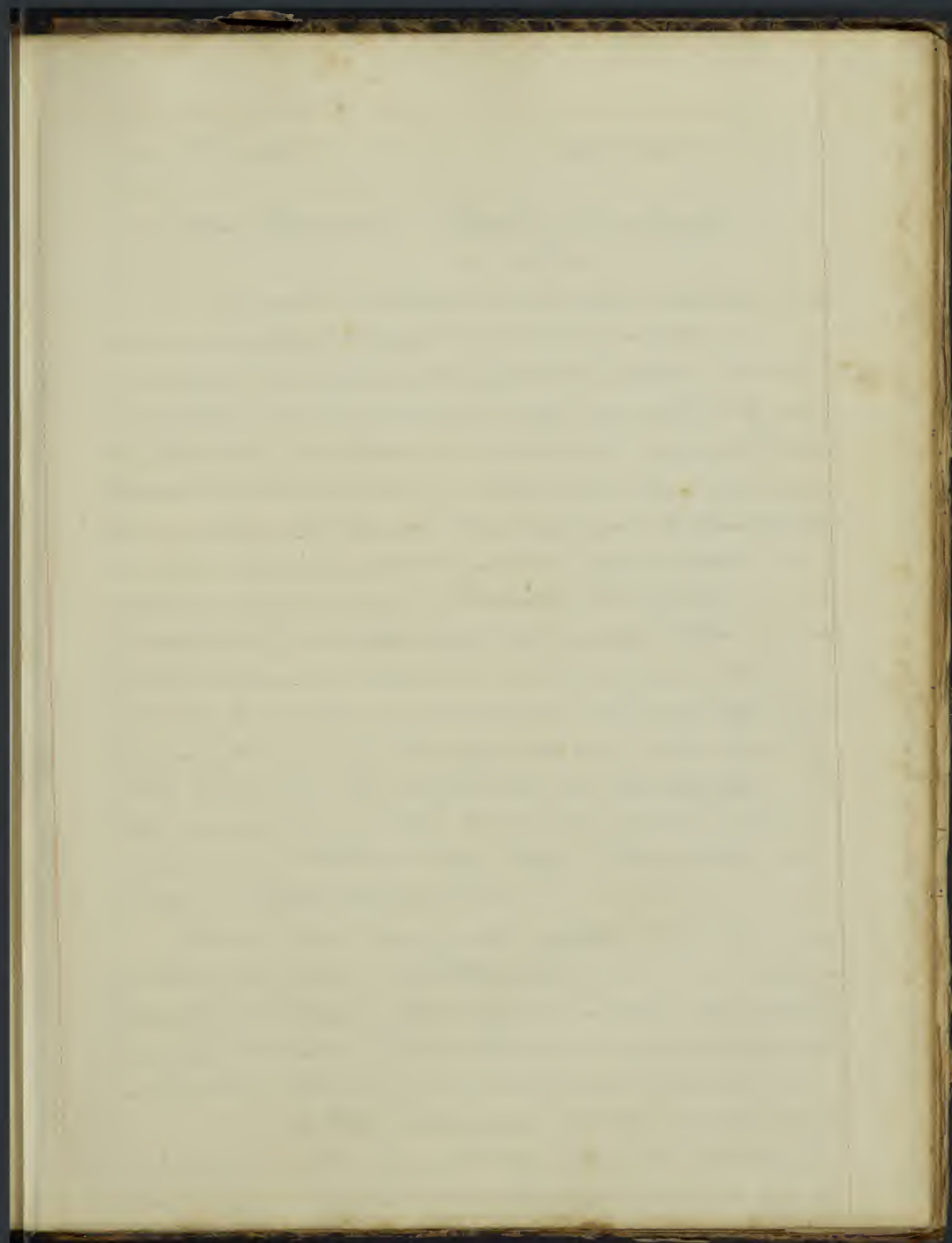


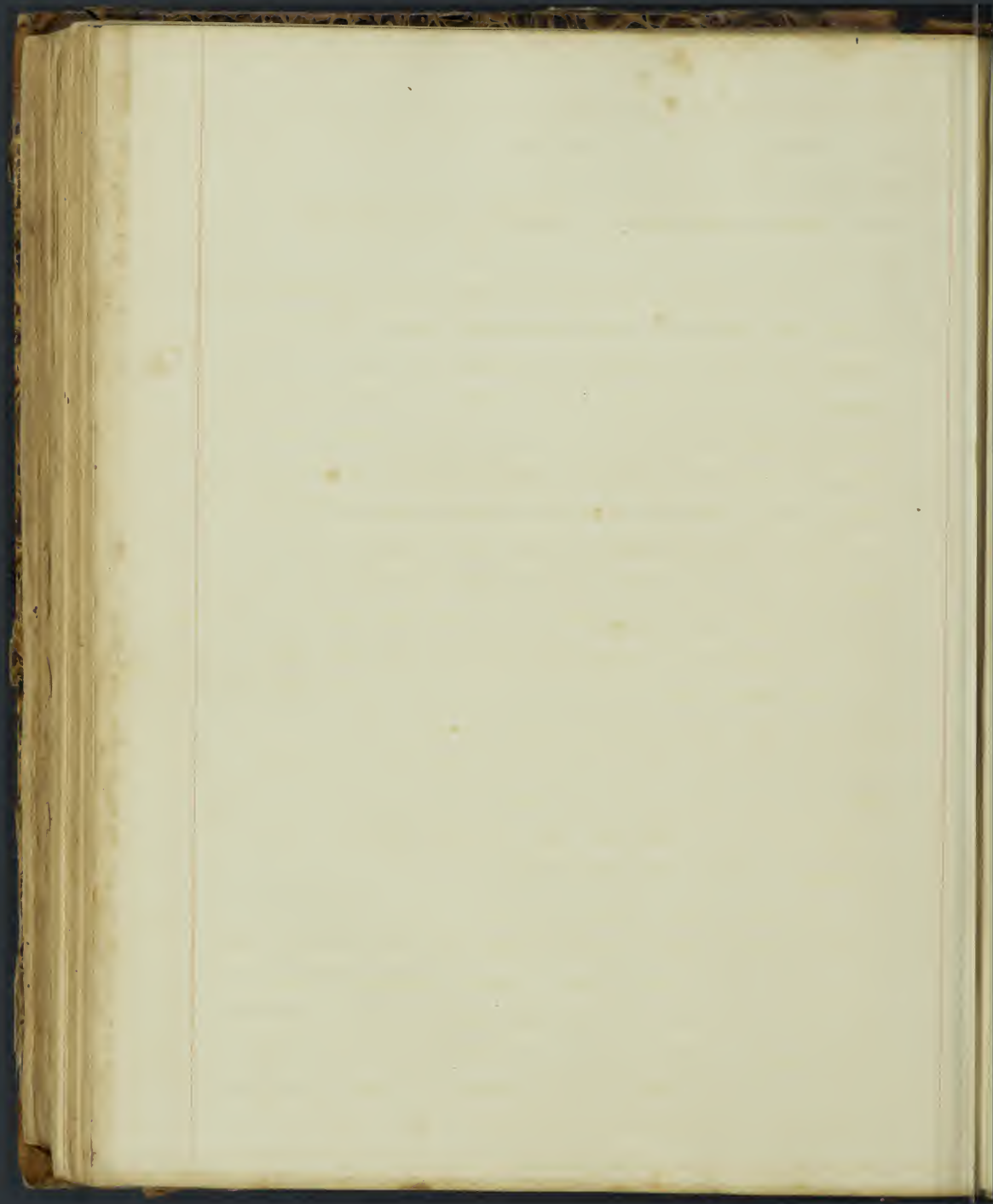












Feb 7 1826. -

Law Merchant. Bills of Exchange. -

By the Law Merchant is meant that customary or unwritten code of laws which governs mercantile transactions. -

It has often been denominated a "particular custom": but this is manifestly incorrect. A particular custom is one confined to particular local limits - one which does not extend thro' the realm: but the Law Merchant is not so confined. - Another reason why it is not a particular custom is that the Law Merchant need never be specially pleaded, while a particular custom must be. - Again, except in new cases where the general usage is not ascertained, that usage can never be ascertained by witnesses; and yet all particular customs are provable by witnesses; and I apprehend, that where the Law Merchant is provable by witnesses, as in new cases, it is not to instruct the Jury, but to inform the Court as to the usage. Since more, the Law Merchant is not to be tried by a Jury except in the cases above specified. - All these considerations go to show that it is not a particular custom.

That it is see 1st BLK 75. Vide Contract Talk 125. 2 Burr 1218. 3id 1669. 4 T.R 208. Doug 72. 3. 653. -

The Law Merchant was originally confined in its operation, in case of Inland Bills of Exch. to Merchants only. But now all classes may avail themselves of this system of Law. It governs particular transactions throughout the realm, but the whole community are included within its operations 2 BLK 86. 2id 459. 67. 50 Ray 175. 2 Vent 275. 210. -

A Bill of Exchange is an open letter of request addressed by one person to another, desiring the latter to pay a sum of money to a third person, or to any other to whom that person shall order it to be

paid, or to the bearer (2d Rayd 175. Kyd. B. 313. 17. Chit 37. 60. 2 Bl 466. 7. ^{314 438.}
It may be drawn then payable to "A or order", to "the order of A" or
Chit 37. 107. 8. to "A or bearer", or to bearer generally (3 Burr 1577. 27. 1 Wils 190.)

The person who makes a draws the Bill is called the "drawer": he
to whom it is addressed the "Drawee", or if he undertakes to pay it, the
"Acceptor", and the person to whom it is payable, whether specially
named or not, the "Payee": and if he appoint another to receive
the money, he is then "Endorser": and any one in possession of it
the Holder. C Kyd 4. 2 Bl 467. 1 H. Bl 586. 602. Chit 13. 22. 3.)

A Bt is substantially an assignment to the payee, of a debt due
from Drawee to drawer: i.e. a supposed debt in contemplation of
Law: thus where A draws a Bt. payable to C - this is an assignment to
C by A of the debt due him from B. (1 H. Bl 602. Ch 13.)

It differs from a common draft or order, by being negotiable. A nego-
tiable instrument is one, in wh the legal as well as Equitable interest,
may be assigned to a third person, not originally a party to it: that
is, the debt or duty raised by it is assignable at Law, so that the
assignee may sustain an action upon it at Law, in his own
name - as the assignee vs the Drawer; or where the Drawee makes
himself acceptor, Assignee vs Acceptor in case he refuses to pay the
Bill (2 Bl 396. 397. 464. Chy 23. 108. Co Litt 265. a. n. 292. b. n. 2 Roll
45. b. 1 Wils 211. 1 T. R 26. 1 H. Bl 682. 5. 4 T. Rep 341. Chy. 7. 8. 7 T. R 243.)

This is opposed to the rules of the com. Law in relation to
choses in action generally: the general rule being that a chose
in action cannot be assigned, because it tends to litigation and
maintenance (1 Inst 265. a. 232. b. 1 Wils 211. 2 Bl 463. Chy 5. b.
108. 1 T. R 26.) The meaning of the rule is, that the legal interest
on a debt raised & secured by the instrument cannot be assigned: so that
the assignee cannot maintain an action at Law upon it. &c. &c.
A bond or note payable to A and sold by him to B. it must be sued

for in A's name. Hence the obligee at Law may release the debt after assignment, an notice of that assignment to the obligor (Chy 108. 106. 7 T.R. 663. 1 B & P 447. 2 Roll 45. 60. Chy. 35. 6. 2 Bl 442.)

Purchasing a chose in action was formerly held to be maintenance. In N.Y. it has been virtually determined that all choses in action are negotiable, except where the action is brought in the name of the assignee (1 Johns cas 411. 1st Rep 531. 3d 425.) They are now made transferrable by statute. —

Chancery has always protected the assignees of choses in action, where the assignment was for valuable consideration. — So if the assignor releases after assignment, the Debtor may still in Chy be compelled to pay the Debt (1 Bac 157. 2 Bl 442. Chy 4. 5 P. Wms 199. 1 Ves 411. 2. 2 Vern 428. 430. 395. 692. Cro Car 282.)

It has been determined in Conn. that in the last case an action of Fraud lies vs the original debtor in favor of the assignee, if the former accepted the release after notice of the assignment, if assignor is not able to pay. — In. Suppose the assignor is able to pay, is not the origl debtor liable in this case? 1 Root 108.

And in Eng^d as well as some of the U.S. the contract of assignment is good at Law as between the parties to it, and is construed into an implied contract or agreement, that the assignee shall have the benefit of the debt, and may use the assignor's name to recover it (2 Bl 442. Lit 125. Chy 5. 109. 1 P. Wms 317. 2 Vern 540. 2 P. Wms 608. 1 Mod 113.) Such assignment is a sufft consideration for a promise by assignee to assignor (Ch 5. 1 Sid 212. 2 Bl 120. 1 Roll 29.)

If then assignor receives the money & releases the debt, he is liable in cost broken; that is where the assignment is by deed. — Note. A chose in action may be assigned without a deed. — 10 Rayd 683. 88. 1242. 3 Keble 344. 1 AlR 133. 135. 1 Port cont 317. Sometimes the action is on the case (4 T. R 690.) —

The Equitable interest of an assignee of a chose in action, has been for several purposes, recognised in Cts of Law. ex. that it is a sufft consideration for a promise. So that when the assignor of a bond, having become Bankrupt, a suit may be maintained upon it, in his name for the benefit of the assignee. So that in an action on a bond given to Plff in trust for A. a debt due from A to Deflt may be set off (Chy 5. 1 T. R. 619. 21. 4th 430. Esp 232. 7 T. R. 663. Ryd 100. Carth 5. 2 Vern 309. 2 Shorr 509. 1 Roll 29. 1 T. R. 621. 4th 430.)

JG. thinks this decision a great & lamentable departure from principle. — Contra 2 Shorr 509. 2 Vern 309. Ryd 108.)

It has been held in Law. that a promise by obligor in consideration of assignee forbearing to demand the debt immediately is binding. —

The negotiability of foreign Blys. was first recognised in Eng^d in the 17. Century. That of Ireland about the same period. (Chy. 7. 12th 14. 2 Shorr 485. 6 Mod 29. 3rd 88. Hard 485.)

The rules that are laid down with regard to Blys. will apply with Equal force to promissory notes, unless particularly excepted. —

Consideration — Generally upon actions of simple contract Plff must prove sufft consideration: Otherwise, in actions on deeds Ryd 47. 67. 2 Burr 1639. 49. 1676. 1 Port Con. 330. 1 T. R. 357. as to Deeds see Chy 9.

But in actions on Bills of Ex. being negotiable, it is in general not necessary for Plff to prove that he gave consideration for it. — Considerⁿ is presumed as in case of Deeds. In this respect (as furnishing internal ev^d of considⁿ) they resemble Deeds or specialties. (Ryd 48. 2d Ryd 70th. 3 Salk 70. ch. 9. 51. 115. 16. 158. 2 Bl 445. 1 Bl Rep 487.)

Exceptions. — Where the Holder claims as bearer of a bill money, which is transferable by delivery, (not an original payee) and under suspicious circumstances. ex. If it had been lost by payee; under

such circumstances Plff may be required to prove that he or some intermediate person took it as a bona fide purchaser (Chy 9. 57. 201. 209. 2 Shaw 235. 3 Burr 1516. 1523. -)

When the Holder is named as payee or indorsee, the writing imports consideration received -

If in settling an account for goods sold, purchaser gives a Bill of exch. for the amount, wh he fails to pay, and an action is brought on the Bill, he can not impeach the acct. (ex. debt) - the Bill being conclusive of the sum due - and in genl, debt is in no case permitted to prove that he received no consideration for the Bill, except when the action is brought by the person, with whom he was immediately concerned in the negotiation of it. as between the drawer & drawee, drawer & acceptor, drawer & payee (Ch 63. Pra 159. 1 Bl Rep 445. 1 Esp R 117. 2 T R 71. 1 Sha 674. Esp Dig 119. n. 2 Camer 246. Ryd 276. 7.) Qu. whether the want of consideration may ever be averred, between parties in immed^a privity?

Where one takes a bill by transfer or indorsement, after it due any party that is sued is in genl permitted to shew by way of defence, that he received no consideration for it; or any other Equitable defence of wh the Holder was aware, at the time of the transfer. - (Chy 52. 113. 1 Ryd 282. 284.) For a transfer of a bill overdue, affords ground of suspicion; and hence it is left to the jury on the slightest circumstance, to presume that the transfer was known by the holder to be unfair (Chy 113. 3 T. R 83.)

Therefore if notice of non payment has been given, or if it can be proved otherwise that the holder knew of its being dishonoured, he is concluded to have taken on the credit of the person from whom he rec^d it, and the above defence will prevail (7 T. R. 423. *Supra* -

Indeed it has been said, that the Holder who rec^d it after it was due, is liable of course to all the Equity to wh it was liable between the former parties (7 T. R 83. 433. 51 83. Ryd 283. Chy 114. 1 P Wms . 1 Wils 230. 2 N. Rep 170.

Foreign Bly are those wh are drawn in one country & sovereign state & payable in another (1 Kyd 10. 2 Show 485. 3 Mod 80.)

Inland, are those payable in the country in wh they are drawn Bankers checks, & Drafts on Bankers are in form like Bly. and are substantially the same, except they are always made payable to bearer (Chy 16. 17. 109. 171. 7 J. R. 423.)

They are now negotiable like Bly. formerly not. (Chy 16. 3 Burr 1577) They are not payable till demanded, in wh they differ from Bly, wh are payable at a particular time (Chy 16. 44. 5. 7 J. R. 423.)

They may be declared on as Bly. tho said not to be protestable. (Chy 16. 171. 7 J. R. 423. 3 Burr 1517. 19.)

They are never recd & treated as cash - Kyd 41. 2. 2d Rayd 744. Doug 635.

If not demanded in a reasonable time and the Banker fails, the holder bears the loss. - (7 J. R. 423. Ch. 16. 44. 5. Kyd 442. 1 Bl. Rep. 1. 2d Rayd 744. -

As to Reasonable time, it was formerly a question of fact for the jury to decide. It is now established (the facts being given) to be a question of law for the Ct to determine. whether the time in any case has been reasonable, is a mixed question, until the facts are ascertained. &c. Suppose the Banker lies not in the same town with the holder; the jury will ascertain the distance &c, & the Ct judge of the reasonableness of the time (Kyd 41. 2. 1 Bl. Rep. 1. Beames L. M. 482. 1 Sta 415. 550. 710. 2 ib 1248. 1175.)

Of the Parties - It was formerly held that no one except a Merchant or one in trade could be a party to a Bly. (Chy 19.)

It has however been long settled, that all persons having understanding & legal capacity to contract, may be parties to such a Bill (1 PalR 125. 12 Mod 36. 380. Carth 282. 2 Vent 292. 1 Show 152. 128.)

Corporations may by their agents, be parties to a Bly tho in Eng^d. certain restraints are imposed upon them by stat^s & Act

2 17 Geo. II. c. 12 Mod 36. 2. Talb 125. Ch 22. 1 Atk 181. 2 Burr 182. 1216.)

The original parties to a Bill are generally three (Kyd says four - might as well say 50) drawer, drawee, & payee; tho' by endorsements & transfers they may be increased ad infinitum. Chy 22. Ryd 33

There may be but two, & indeed but one party to a Bill. - as where A draws a Bill on himself, payable to his own order: this however is rather in the nature of a promissory note when it is endorsed over: But it is declared upon as a bill of exchange (Chy 22. Earth 509. 150. 163. 3 Burr 1677. Fort 281. Talb 130. 6 Mod 29.) -

A person not orig^l party to a Bill may become a party by its negotiation: thus a stranger may accept for the honor of the drawer or drawee. - he makes himself acceptor. (Beaves 456. Earth 129. Chy 23. 103: 130. Ryd 153. 6.) This is "acceptance *supra* protest" -

So on refusal by drawee after he has accepted, a stranger ^{Ryd} may become party by paying it. (Esp. Rep. 112. Chy 23. 115. 163. 4.)

A person may become drawer, ~~indorse~~ acceptor, not only by his own act, but by his agent. 6 Mod 36. 12 ib 346. 564. 9 Co 756. 2d Ray 930.) In such case he is said to become a party by procuration. (Chy 24) As the act of the agent is only ministerial, almost any one may act as such - as an infant, feme covert &c: for the legal disabilities of such persons are confined to their own acts. (Co Litt. 522. Chy 24. vide Husb & Wife.)

And an agent for the purpose of making a person party to a bill may be constituted as well by parol as by deed. -

A Bill being merely a parol contract - secus as to special contracts - 12 Mod 564. Chy 24.)

An agent acting under a general authority may bind his principal to any amount: but a special agent can bind only specially. - (3d Rep 707. 1 H. Bl. 155. 2 ib 618. 6 D. Rep. 1 Esp. Rep 111.)

In Mercantile usage a person signing a blank paper

8 delivering it to another, authorizes him to fill it up to any amount wh the stamp will warrant - Rule not applicable
4 Cruise 26. to deed - that takes effect by delivery &c. - (Shep. Touch. Pickers

And the signing party may be made drawer, indorser or acceptor. Dong. ⁵¹⁴196. 14. Bl 213. Kyd 110. Chy 25. 55.)

An agent can never delegate his authority unless expressly authorized - in most cases he is so authorized - such authority is fiduciary - & confidential: and the rule applies equally to all agents. (9 Co. 75. 1 Roll 330. Chy 27.)

When a person is to become party by procuration, the agent shd always execute the deed in the name of the principal - otherwise he becomes personally liable -

(Sta 700. 6 T. R. 176. Com. D. Atty c. 14. 1 D. Rep 181.)

One of two joint traders may by accepting a Blx in the name of the firm, bind the comp^t provided it is given to secure a debt contracted for the comp^t. (Salk 125. 292. 7 T. R. 207. 12 Mod 354. Chy 27. 8. 112. 200. Pr. rep. 16. Bac. abn. Merch C.)

It is said however that the act of one partner will not bind the firm, tho done in the name of the firm, if it concern himself only - (Salk 125.) But the proposition is too broad. If one contracts a debt professedly on his own account, & gives a Blx in the name of the firm, the others are not bound - but if he professes to contract for the firm, they are all bound. - The distinction then depends upon the fact whether the party contracting with the partner, knew the nature of the transaction. -

And even if one partner shd for the purpose of defrauding the other, purchase goods professedly in the name of the firm & give a Blx accordingly, the firm is liable. - 2 Vern. 277. 92. Esp Dig 524. Pr. rep 80. Chy. 13. 28.)

It has been further held, that if a Bt. is drawn on the firm, & accepted by one of them in his sole name, the acceptance binds the whole firm. (Camp 384.) As the Bill was drawn on the firm, the acceptance followed the nature of the order drawn on the firm. - (2 Camp 308. 15 East 11. 12.)

Two persons by making a Bt. payable to their order, make themselves partners quoad that contract. - (Watson on Part. 253. Doug 603. Pez rep 16. Chy 29.) The indorsement of one is the indorsement of both. -

Corporations cannot accept except by agent. (Chy 29.)

All Mercantile instruments are construed liberally: - hence no particular form of words is necessary to the creation of Bt., check or note: it must contain an order to pay, and describe some one as payee &c. -

But tho' the Law prescribes no set form, yet certain forms have been adopted by usage. (Chy 26. 58. 3 Wils 213. Ryd 60. Sta 629. 1 Esp rep 129. Bac Abr. obligation B.) -

Hence a writing thus "I promise to account with A.B. on his order for £ 50." was held a promissory note. - A person bound to account, is bound to pay. (Sta 629. 2 Laid 1396. 8 Mees 364. Ryd 61.)

But there are certain essential requisites or qualities, wh^{ever} every instrument must possess: & without wh^{ich} it will not operate as a Bt. It will then be mere evi^d of a part^{ial} cont. (Chy 140. 2. 32. 3. 143. 184. 1 Ld laym. 1545. 2 East 359. 360.)

The word "instrument" in Law has a technical sense. Every written contract is not an instrument. It is confined to those writings wh^{ich} of itself constitutes a ground of action & defence; & wh^{ich} is counted upon as pleaded as such. -

A Bk is therefore an instrument, when it has the proper requisites. -

Without these requisites, a writing does not carry with it any internal evidence of consideration, and is not negotiable (3 Wils 213. 2 Bl Rep 1072. 5 T. Rep 485. 7 L 241. 1 H Bl 239. 242.)

This last rule is qualified by some, to a certain extent; i.e. as between drawer & payee - It may be accounted such. -

A writing not possessing all the above requisites, may be declared on as ~~asset~~, as between the original parties. But the principles are contradictory. 7 T. R 243. 5 L 485. Chy 38. 48. 6 T. Rep 128. 1 Selw 18. Ryd 65. Contra 3 Wils 211. 2 Bl Rep 1072. Parly on B. 8.

These Requisites are two. viz. 1 That the Bk must be payable at all events, and not upon any Contingency. - 2^d It must be payable in Money only.

Ryd 65. 3 Wils 213. 2 Bl Rep. 1072. 5 T. Rep 485. 7 L 241. 1 H Bl 239. ch 32.

The first requisite is necessary because third persons wd know nothing of the condition, or contingency; It wd in short destroy the Chy 32.3 effect of it. (5 T R 485. 3 Wils 213. 1 Parr 325. 2 Sta 1157. Ryd 66.

Upon the same principle if the Bk. be made payable out of a particular fund, wh may or may not be productive, it is not negotiable. - It must import a credit given to the Drawer & not upon the credit of his property. - 2d Ray 136 L. 1396. 1583. Sta 1157. 7 T. R 242. 5 L 482. 4 L 343. Bl Rep. 782. Ryd 57. 2. 3 Wils 207.

There is an exception to this general rule, when the event on wh the Bk is payable, is of notoriety, morally certain, & respects Trade. (Sta 24. 1 Wils 262. Bull N. P. 272. Ryd 57.)

On the other hand, if the event must inevitably happen at some future time, the Bk is valid. - (1 Burr 226. Sta 1217. Chy 324.

The mention of a particular fund out of wh the drawer is to reimburse himself does not vitiate: the personal credit of the Chy 34. drawer is still liable. (Sta 713. 2d Ray 1481. Long 578. Ryd 67.)

So words inserted to point out the consideration of the acceptance, do not vitiate - (Ld Ray 1545. 7 T.R. 733.)

The 2^d Requisite is that it be to pay money only: (Ky & Co. Chy 24) the reason these bills were designed to facilitate remittances & not as a medium of Barter. (Sha 1271. Chy 35.)

In Comm. it was decided that a Bly payable to order in the city of N. Y. in current bank bills was a Bly. In Mass decided the other way. - and whether such a bill is negotiable is still doubtful: I. G. thinks no inconvenience wd arise. -

But an instrument tho' deficient in one of these Requisites may still be used as evidence: tho' as a Bly it is of no force. - (2 Bl Rep 1072. Kyd 58. 65.)

In the case of Foreign Bly. it is usual to draw two or three: so that in case of loss there will be no difficulty: But they must take notice of the others, to prevent double payment. (Chy 46. Bailey 15.)

The Bill must either point out the individual to whom it is payable, or be made payable to Bearer. But if it should not designate any payee, but mentions of whom the value is recd. it is construed as payable to him. (Chy 46. 1 H. Bl 608.)

With regard to bills payable to a fictitious payee or order, it is in effect payable to bearer: as apt all such parties to it as knew the payee to be fictitious when they became parties: secus if they did not know. (3 T. Rep 174. 182. 481. 1 H. Bl 313. 386. 569. 2 Bl 194. 228. Chy 47. 59. 66. 109. 202.)

A Bly may be made payable to one person for the use of B. sig of bond &c. The legal right is in A & he must sue upon it. (Cuth 5. 2 Vent 307. 6 T. Rep 123. 1 H. Bl 313. Kyd 108.)

A Bly to be negotiable must contain operative words of transfer: i.e. the word "order" "to bearer" &c to A or his assigns &c - 3 Wils 211. Sha 1213. 2 Wils 353. Chy 48. 108. Kyd 168. 36. 63. 65.

A Bly payable "to the order of A" is the same as one payable "to A or order" (Carth 403. Chy 15. 134. 187. 5 East 476. Ryd 108.)

Bly & Promissory notes need not contain the words "value recd." tho' usual: for these instruments import a consideration within themselves. (2d Ray 1481. 8 Mod 267. 1st 310. 3 Mch 312. Chy 50. Ryd 61. 2.)

Where a Bly is for accommodation & that fact is known to the indorser, he can recover no more than he paid, if that sum were less than the amt of the Bill. - Thus A may consent to accept a Bly, tho' he owed the drawer nothing. - (Esp rep 261. R. 346 61. 2. 210. Chy 51.) This rule does not hold where a Bly is drawn for a debt ^{is. from drawer to drawer} actually due - for the acceptor cannot complain - he pays no more than his debt. (Chy 52.)

Where a Bly is drawn for money actually due, it is an assignment of a debt. Du. as to proposition in Chy that holder retains surplus for the indorser. Is he not entitled to it himself? There certainly is no harm in thus buying Bly. -

With regard to the illegality of consideration in these contracts it may be ^{assigned} ~~assigned~~ wherever want of consideration may. (Chy 52.) This may be done between the parties in immediate priority, and where it is transferred when overdue. - (Doug 614. 636. Ryd 280.)

And a subse^q holder knowing at the time ^{of taking it} that the consideration was illegal, ~~he~~ cannot recover upon it. (6 T. Rep 61. 1 Esp R 116. Chy 52.)

In fact any bona fide holder having no knowledge at the time of taking it, ^{of the illegal consid} ~~he~~ can recover upon it: tho' it wd have been void as between the origl parties. (Doug 614. 36. Ryd 277. 280. 3. 3 T. Rep 300. 2d 390. 454. 537. 7th 607. Sta 1155.)

But there is an exception to this genl rule, whenever stat Law has declared Bly to be void - in correct - the true rule is this: Where stat Law has declared a Bly void from illegality of consideration, it cannot be enforced by a 3^d person agt the drawer & acceptor. -

(Doug 646. 70. n. 2 St. Pl 647. Sta 1155. Carth 356. 1 East 92. 1 Rep. rep 274.)

With regard to consideration declared illegal by stat, the distinction is this: if the recovery by a subject bona fide holder wd defeat the object of the stat, he cannot recover. Secus if it wd. not defeat the stat. Thus if A gives a Bk for usurious consideration to B. who indorses to C. C may recover agt B, tho he cannot agt A. (Sta 1155. Doug 739. 760. 2 Phil 22. Talk 344. 5 Mo & 175. 9 Mass. 1. 6 Branch 224.)

Phillips says the indorser who is himself the usurer

If the orig Bk is forged, still the person indorsing it over, is bound. It becomes a new contract in the hands of indorser. (3 Day 12. 2 Phil 22.)

Chy says holder can recover only from party from whom he receives. Judge G. does not see the principle of the distinction. -

On the other hand if a Bk wh is good in its creation, is indorsed over on ~~usurious~~ consideration & passes into the hands of 3^d persons, they may recover of drawer or acceptor: - the stat wd not be evaded. - (1 East 92. Chy 53. 4. 1 Esp. rep. 273. 3 T. Rep 390. Rde 103. 2. 2 Conn rep. Loyd vs Reach. -)

And in the above case the usurious indorser cd not recover. -

Bks are very liberally construed: (2 Ark 33. Chy 58.) hence where a note was in these words "I promise never to pay" it was held good: there must either have been a gross mistake or fraud -

To most purposes the contract is construed according to the Law of the country where it was made. - Lex Loci governs. - (2 Sta 733. 13 East 453. overruled. - 2 Bos & P. 141. 2 N Pl 603. Corp 174. 2 Burr 1077. 7 T. Rep 242.)

But tho Lex Loci generally governs, there is an exception as to time of payment - that is regulated according to the Law of the country where it is payable. (Chy 57. Beaves Plac. 257. Ry & S. Tho' the effect of the language is to be determined by the Law of the

country where it is made, yet,

-As to the result in its form & extent, the lex fori governs. -
The distinction then is this: the nature, construction & legal effect is governed by the Lex Loci Contractus; the mode of enforcing the right with the Plt conform, as the form of the action is id. to be governed by the lex fori. - (7 J. Rep. 241. 1 East 6. 5 Bl. 5 Branch 298. 302. Esp. rep 164. 1 Bos. 138. 2 Johns. 198. 11 B. 194. 3 Conn 525.)

Where a person receives a Plt on account of a former debt, scilicet if he has no higher security, he cannot in good conscience for the former debt, before the Plt becomes due: the debt still exists but the right of action is suspended till the Plt becomes payable. - (12 Mod 577. Chy 62. 6 T. Rep 52. 7 B. 64. 1 Esp. rep 5. 106. 5 T. Rep 573. SalR 443.)

If a Plt is altered while in the hands of the Holder, in any material point, & without his consent, the drawer is discharged. - for the instrument, altered as it is, is not his act. (4 T. Rep 320. 5 B. 367. 2 H. Bl 141. Chy 62. 3.)

The same rule holds in favor of an acceptor or indorser, where the alteration is made after acceptance or indorsement. -

But if it is altered before acceptance & afterwards accepted, it may be valid in the hands of a subsequent bona fide holder: so of indorsement. It is the same instrument (Chy 63. Beaves Plac 46.)

But the party making the alteration can recover agt no one - such act amounts to forgery, & no one can acquire a right by an unauthorized alteration. (1 Co 27. a.)

With regard to the obligations incurred by the parties, the Drawer is under the engagement that Drawer is legally capable of accepting the Plt, that he is at a certain place, that if the Plt is presented, it will be accepted according to the tenor, and finally that the Drawee will pay it. (Doug 53. 2 H. Bl

378. 12th up 511. Sta 1087. Chy 63.4. 70.2. Ryd 109.

The same implied engagement is undertaken by the indorser, as to every subsequent holder. (3 East 481. 3 Mass 557. 4 Johns 144.)

No such engagements are implied, however, where the payee or receiver expressly assumes all risks: he waives all claims. -

And again, the rule is not predicable of a case where a Bkx is transferred upon a discount: that is a person delivering over a Bkx by mere manual delivery, without endorsing it, for a sum of money by way of purchase, comes under none of these implied engagements. - By the discount of a Bkx is meant the sale of it for value, without endorsement. - And the case is the same where the holder transfers it for a debt, ^{he may be answerable for the debt} without endorsement.

The maxim "Caveat emptor" is the foundation of the rule: if he wishes the security of the holder's name, let him get it. - (3 T. Rep 757. 1 Esp rep 447. 7 T. R. 63. 56 Ryd 90. 1. Tulk 128.)

This exemption does not extend to any one whose name is on the Bkx (Silv cas 128. 12 Mod 241.)

Where the party is under these engagements, upon the failure of any one, he becomes immediately liable to the whole amount of the Bkx, damages & costs, even tho' the Bkx is not payable. - (Doug 55. 3 Burr 1687. 1st 669. Bull 269. 6 T. Rep 52. 139. 3 Mch 16. 17.)

All the indorsers are liable. (4 Johns 144. 3 East 481. 3 Mass 557.)

The drawer is thus liable whether the Bkx was drawn on his own or another's account (6 T. Rep 52. 139. 3 Mch 16. 17.)

The obligation is irrevocable: thus where a Bkx was drawn upon one in a foreign country, who by the law of that country is prohibited from paying it, the Drawer is liable (Chy 64. 9. 2 A. Pl. 378. Poth. pl 58. Ryd 117. 156.) -

But the holder may lose the benefit of these implied engagements by his neglect (Chy 68.) vide post as to manner of losing them. -

Chy 66. It is in some cases necessary, but all expedient for the holder, if he
Ky 8117. receives the Bly before acceptance, to present it for acceptance.

When the Bly is payable in a limited time after sight, presentment is necessary, otherwise the time of payment could never come. -
Chy 67. 86. 203. Ky 8117. 1 H. Bl 565.)

In other cases it is not necessary, this advantageous to present beforehand :- for if the Bly is not to be accepted, he wants his remedy immediately agt the prior parties (5 Burr 2670. 1 T.R 712. 2 Show 496. Com. Dig. Tit. Merch. F. 6. Ky 8118. Beawes pl 266. Chit 67. Marsh 46. Poth. pl. 143.)

And where it wd be otherwise necessary, Holder may excuse his omission by proving, that neither drawee nor indorser had any effects in the hands of drawee; or that drawee was insolvent & known to the drawer or any other party, as a Bankrupt. - So by any other facts wh shews that Deft has not been injured by Holder's neglect. - (Chit 68. 102. 132. 203. 2 H Bl 236. 569. Ky 8136. 2 T. Rep 717. Ky 8129.)

The rule as to the time of presenting for acceptance, when the Bly is payable after sight, is that due diligence must be used by the holder: i.e. it must be presented within a reasonable time, under all the circumstances. - (Chy 68. 9 Ky 8117. 18. 2 H. Bl 569. Poth. pl 143. 7 T. R 425.)

So as Chy says of Bly payable at sight (Chy 67. 8. 68.) not correct. The rule as to the time of presenting such Bly relates to the presentment for payment, presentment for acceptance not being necessary. -

7 T. R. 425. What is a reasonable time is said to be a question for the Jury. - facts being ascertained it is a question of Law (2 H. Bl 569.)
It seems to be a question (the facts being given) for the sake of certainty: tho whether there has been a reasonable

notice in every particular case, is a mixed question (Beaver pl 229. Chy 89. 96. 137. 146. 153. 17. Rep 167. 579. 4. 148. Ky & 41. 2. 127. Ray 18. Doug 575.) -

Presentmt shd always be made at the usual hours of business (Chy 89 Marsh 112. Ky & 125.)

Neglect to present at the proper time, may be excused by illness, and other proper causes (Chy 89. 148.)

It is said that Drawee ought to refuse or accept immediately on presentmt (Com Dig. Merch. 4. 6.) It is usual however, to leave it with him 24 hours, that he may have time to examine his account with the Drawer, unless he voluntarily accepts or refuses sooner. If he does not accept within that time, the Bk may be considered as dishonored (Chit 70. 2. Marsh 16. 2d Ray 281. Beaver pl 229. Ky & 126.)

But it is said, this may be done, if the mail goes out in the mean time, before the expiration of the 24 hours: but it is matter of discretion in a measure (Marsh 63. Com. D. Merch. 4. 6.)

If the Drawee is not to be found at the place described, & it appears that he never resided there, the Bk is considered as dishonored: - or if he has absconded: - for this is a violation of an implied engagement (Chy 70. 89. 136. 1 Esp. rep 516. 2d Ray 7. 743. Marsh 27. 112. Beaver pl 22. 4. 6. 7. 9. Ky & 125. 7.)

But if he has removed, presentmt shd be made at the place to wh he has removed, & shd if possible be to the Drawee himself: this is not considered as coming within the implied agreement (Chy 70. 135. 6. Sta 1087. Boyle 58.)

Scind if he has left the Kingdom or State. (comb) Holder is not bound to follow him: presentmt at his house is sufft. -

This I. G. thin Rs will apply to the diff't U. S. (Chy 70. 1. 132. 6. 1 Esp rep 511.)

If the Drawee is dead, presentmt shd be made to his immediate Representative, if to be found within a reasonable distance. rule vague. Chy 70. 1. 132. 6. Poth. pl 146.)

The matter of fact being ascertained by admission of the parties, or

by the day; as the distance, makes leaving the place be, it then becomes a matter of law for the court to determine whether the time was reasonable.

Acceptance is the act of engaging to comply with the request contained in the Bk, and may be either by writing, or parol.

Acceptance by Agent is valid: but the Agent if required must produce his authority to the holder: otherwise it may be considered as dishonored (Chy 23. 75. 6. 200. Beaves pl 87.)

It is doubtful whether the holder is in any case bound to acquiesce in acceptance by agent: as it multiplies the necessity of proof (Chy 71. 2. 1 Esp. rep 115. 269.)

Acceptance by one partner for both, binds both. But if a Bk is drawn on two persons, not partners, and accepted by one only, the other is not bound, & it may be considered as dishonored (Chy 29. 73. 113. Bull N. P. 279. Beaves 228. Holt 297.)

If drawee is found to be an infant, feme covert, or otherwise incapable, the Bk may be treated as dishonored: - for this is a breach of implied Warranty (Chy 63. 71. 2.)

A promise to accept in future will operate, as a present acceptance, even tho by parol "e.g. Leave the Bk & I will accept it": for it gives a Bk credit & prevents its being protested. (Chy 75. 6. 7. Bull N. P. 270. Marsh 17. Corp 573. 3 Burr 1669. 1 Atk 64. 5 East 514. 5 East 514.)

So a promise to Drawer to accept a Bk to be drawn in future is binding, if attended with circumstances, wh may induce a third person to take it. e.g. a letter to drawer says "I will duly honor your Bk": this shewn to indorser before he takes it, is an acceptance (Chy 77. 75. Corp 670. 1 East 98. Ry & 74. 81. Beaves 454. 466. 3 Burr 1663. 1 Atk 64. 611.)

Acceptance after the day of payment will bind acceptor, tho drawer & indorser shd be discharged, unless duly notified of the

non acceptance & non payment on the day. In this case acceptor is liable to pay on demand (Chy 73. 81. 74. 12 Mod 410. 2d Ray 344. 574. Salk 127. 9. Earth 45. Conn Rep 75. Beaves pl 324.)

Drawee tho' having effects of the Drawer, is not safe in accepting, after he knows of the Drawers failure. i.e. under the Eng. Bankrupt Laws - for he wd be compellable to pay over again to the Drawers assignees (Chy 74. 151. 2. Poth pl 96. 2 H. Bl 334.)

But if he accepts without notice, he may pay after notice, & will not be liable to Bankrupts assignees (Chy 74. 152. 7 T. R 711.) —

The acceptance of a Bly may be either absolute, conditional or partial: but unless it is absolute, Holder may consider the Bly dishonoured - he is entitled to an unqualified acceptance according to the tenor of the Bly. — (Chy 33. 74. 103. 180. Sta 214. 648.)

If however the Holder is satisfied with the acceptance, he may receive it: and, if he gives notice to the prior parties of the nature of the acceptance they will be bound. Sta. 1152. 94. 1212. 214. 648. 2 Wils 9.

1 T. R. 182. Chy 74. 5. 79. 81)

What amounts to an acceptance is a question of Law. — (Chy. 75. 1 T. R 182. 6.)

An absolute acceptance is an engagement to pay the Bly according to its tenor: may be in writing or by parol - now usually in writing.

The usual form is, "accepted R. B. M." but "accepted" without the name, or the name without "accepted" is suff. — (Chy 725.)

But any act of the Drawee evincing his consent to comply with the request in the Bly will amount to an acceptance: thus merely noting the day of the month, or year &c & almost any thing from wh the Holder can infer an intention to accept Comb 401. Bull 270. Chy 76. Ky 80.

Drawee is bound by a verbal acceptance. (1 Esp. rep. 13. n. 3 Burr 1674. Crox 571. 2 Wils 9. 1 East 103. 4th 72. 2)

This rule obtains even tho' there is no consideration between Drawee

& Accepta: third persons must not be defrauded by any latent defect between prior parties. -

A promise to accept, if obtained fraudulently, does not bind as to party practising the fraud - secus as to subsequent parties. - 3 Burr 1669. Chy 77.)

It is not indispensable that a written acceptance shd be on the Bk: if, in a letter be sufft. (Sta 648. Ky & 69.)

And there may be an implied acceptance: as where there is some circumstance wh induces Holder to believe that it has been accepted. - (1 Esp up 17. Chy 72. 17. Rep 269. Hard 75.)

Acceptance may be implied from Drawee: Keeping the Bk. - he ought to have accepted or refused before. (1 Esp 611. Chy 77. 9. Hard 270.)

In short any act of the Drawee wh gives credit to the Bk, & detests the Holder from sending notice of dishonor, is deemed an acceptance (Bull 270. Ky & 80. Chy 77.)

A conditional acceptance is an engagement to pay the Bk on some contingency: Holder not bound to receive. If he does, acceptor is bound. Holder ought to give due notice of the nature of the acceptance to the prior parties: Otherwise they will be discharged. -

Ky & 161. Chy 33. 74. 5. 79. 103. 180.) Sta 1152. 1212. 2 Mil 9. Corp 571. 17. Rep 132. 12 Mod 447. Chy 79. 80.)

A conditional acceptance if received by the Holder, becomes absolute when the contingency happens. - (Sta 212. Corp 571. 17. Rep 183. Chy 807. 101. 2.)

Where the Drawee accepts in writing, the condition, if any, must be written also - for verbal condition will not avail w a subsequent holder, where the acceptance was written. Secus if acceptance had been verbal. - He wd be deceived.

But such an acceptance wd be valid as between the parties. (Doug 286. 96. Chy 81. Hardw 137. 3.)

he wd be bound by the condition

But if the subject Holder gave no value, or had actual knowledge; for in such case he wd have no more Equity than the immediate Holder.

A partial acceptance is an unconditional one varying from the tenor of the Bly: as an absolute engagement to pay part, or at a diff^t time. (Sta 214. Comb 452. 11 Mod 190. Sta 1194. Chy 81.)

The Holder may refuse such acceptance & treat the Bly as dishonored. In such case he must give the prior parties due notice in one of two ways: i.e. he must give notice of the dishonor if he refuses the acceptance "in toto" or if he wishes to avail himself of the acceptance, he must give notice of the nature of the acceptance. -

If he gives notice of dishonor, he waives the acceptance & Drawee is discharged: - (1 T. Rep 182. Chy 82. 5. 157.)

Whether an acceptance is absolute, conditional or partial is of course a question of Law (1 T. R 182.)

By an absolute acceptance Drawee must pay according to the tenor of Bly. If conditional or partial his liability is regulated by the acceptance. (4 T. R 174. Poth^{re} 164. 115. 17.)

An acceptance is binding as between 3^d persons, as payee or indorsee, tho' the Drawee accept without consideration & tho' Holder knew the fact. - (11 Mod 117. 8. 4 T. Rep 339.)

Hence an acceptance by Ex^r of Drawee is an admission of assets, and Ex^r wd be bound even tho' he had no assets (2 H. Bl. 3 Mil 1. 2 Sta 1260. 2 Burr 1225. 1 T. Rep 487.)

Same rule holds of an indorser of an Ex^r (Chy 113.)

The obligation created by an acceptance is irrevocable. i.e. accepta himself cannot do it. But if acceptance is made in a foreign Country by the Laws of wh. it becomes invalid there, it will also be invalid here. Lex Loci governs the contract of the Drawer. (Chy 59. 60. 61. 62.)

Such obligation may be discharged by the Holder, by parcel accept. -

Fixed in other contracts: not founded on the Equitable spirit of the Law
Doug 236. 247. Esp. Dig 47. Chy 13. 197. Merch. B. 3

Hence a message sent by Holder that the "Bly was settled" was considered
a discharge. So where the two parties agreed that acceptance shd be
annulled (Doug 236. 7. 246. Chy 84.)

Substantive, in the books whether Holder receiving part of the amt
from Drawer, & getting his promise for the residue at an enlarged
time discharged the acceptor. I. G. cannot see how acceptor
shd be discharged. (Doug. Chy.

In regard to the effect of an alteration in the acceptance, there
is a strange decision in the Books viz. A Bly is drawn for 1000. accep-
tor agrees to pay 500. Holder converts it into an absolute accep-
tance, & then alters it to its origl form: now it was held that the
acceptor was bound (Chy 85.) I. G. thinks the Holder was guilty
of forgery. and besides whose acceptance is now on the Bly? not of
the Drawer - his was destroyed by the Holder himself. - The deci-
sion is opposed to all analogy. -

The Drawer of a Bly often assigns goods to Drawee as security; where
this is the consideration of the acceptance, & the Holder takes the assignment
the Drawer is discharged (Chy 85.)

The act of acceptance implies that acceptor has effects of Drawer:
and the presumption is not to be rebutted agt a subsegt bona fide holder.

Hence Drawer may recover agt the acceptor. (1 Will 135. Salk 30.
2d Ray 88. Beaves 455. Ryd 156.)

If in point of fact Drawer has no effects of Drawer, he may prove
that fact agt him, & prevent a recovery - And if in such case, he pays
the Bill he may recover from Drawer (Ryd 156. Chy 163. 191. 203. 5.)

But as agt subsegt Holders, the acceptor is not allowed to prove
the want of consideration (1 Will 137. 190. Salk 127. 121. Ryd 156.)

If the Holder makes the acceptor &c &c dis, he is discharged: the right & the duty are united in the same person. The Indorsers &c are consequently discharged: - for their liability is only secondary. (Tabl 299.

2 Bl 511. 12. 3^d ed 18. Chy 181.)

Non-acceptance is a refusal or omission to comply with the request in the Bk. Where presentmt is made & acceptance refused in toto or in part, the ^{Holder} must give notice to the parties. -

Notice

5 Burr. 2470. 1 T. Rep 712. Doug 658. 671. Chy 674. 65. 158. 202.

The reason of giving notice to prevent the discharge of the other parties, is that they may take measures to secure themselves & guard agt loss. - If the Holder shd not give notice of dishonor it wd be presumed ^{the other parties} paid - & wd consider themselves discharged. -

It was formerly held that when a party wanted to set up this defence he was bound to prove actual damage from want of notice. But it is now settled the other way. The Law presumes that such party has sustained damage, & the Holder must prove that no damage has been occasioned (1 T. Rep 406. q. 3^d ed 182. 2 H. Bl 612. Ryd 129. Chy 87. 191. 203. 5. 132. 3.

If during the whole time from the date of Bk. to the day of payment, the Drawer had no effects in hands of Drawer, he is not prima facie entitled to notice of dishonor - he is presumed to have known that it must be dishonored. (1 T. Rep 405. 712. 2^d ed 713. 2 H. Bl 610. 1 Bos & P 652. 3^d ed 230. 5 T. Rep 239. 1 Esp rep 333. 2^d ed 575. 537. 3^d ed 158.)

As to the question then, whether Drawer had effects in the hands of Drawer, the Holder must prove that he had none, to excuse the omission of notice. -

This the drawer had effects in the hands of drawer, the acknowledged fact that drawer has sustained no damage, does not dispense with the necessity of notice. The rule is positive & presumptory. - (7 East 357. 1 Esp. rep 333. 3^d ed 158.)

And in regard to promissory notes, it has been held that payee indorsing

it with a knowledge of maker's insolvency, he continuing so till day of payment, cannot defend in an action on the ground of want of notice. - (2 H. Bl 336. 17. Rep 410. 1 Esp 302. 203. n. R. rep 203. n.)

This determination seems to be thought overruled - but I. G. thinks not. (2 H. Bl 609. 13 East 187. 11 id 357. 2 Com rep 126. 2 Camis 343. 4 Cranch 161. 5 Mass 52. 2 Haywood 457.)

What necessity can there be of notice, according to the analogies of Law? Drawer is not entitled to notice when he has no effects in hands of Drawee. So indorser knew that maker did not pay, from the beginning. - His liability was in reality primary. -

Tho the indorser has effects in hands of Drawee, yet if Drawer has none, the latter is not entitled to notice (1 Esp rep 515. Chy 88.)

If however Drawer had effects at the time of drawing, no subsequent event will dispense with the necessity of notice: as the known Bankruptcy of Drawee, death &c. (Doug 497. 515. 17. Rep 408. 2 id 336. 2 H. Bl 612. 7 East 337. 1 Esp 334. n.)

The same rule holds in favor of an indorser: viz. if he paid value for the Bkly. & it is dishonored he must have notice (ib. anch.)

And if drawee inform the Drawer beforehand that he wd not accept, the Holder must still give notice. The Drawee might have changed his mind. (2 H. Bl 612. 5 T. Rep 239. 1 id 405. 712. 285. 2 Burr 1355. 1 Bos & P. 652. 2 Bl Rep 390. 824.)

Proof of actual injury, will rebut the presumption of drawer's not sustaining damage from want of notice, where he has no effects in hands of drawee - I. G. does not see how. (2 T. R 713. 1 id 714. R. rep 203. n.) No actual injury can arise from want of notice. -

If drawer had become Bankrupt, he is not entitled to notice. - It wd be of no service. (3 Mo. Chy 1. Chitty 69. 39.)

If drawer absconds he is not entitled to notice (1 Esp. 516. Chy 39.)

An omission to give notice, where it is required by general rule, may be excused under special circumstances: as if Holder shd die suddenly, want of notice wd not prevent his representatives from recovering, provided they give notice within a reasonable time. — (Chy 89)

Where drawer makes conditional acceptance & the terms are complied with, no notice to prior parties is necessary, ^{that the acceptance} was conditional: for before the time of payment, ^{the acceptance} wd become absolute (Chy 89. 90. 101.)

Where drawer accepts for part only, prior parties are bound to the extent of the acceptance without notice: it is absolute quoad the amt accepted. — (Chy 90.)

The mode of giving notice is diff't in inland & foreign Bly. — There is a specified mode in case of a foreign Bly, & no other will answer. — No prescribed form is used in the case of inland Bly. (1 T. Rep 170. Chy 90. Ryd 136. 142.)

But in the case of a foreign Bly, there must be a "Protest" made out, whenever notice of dishonour is necessary. This is the only admissible proof of dishonour, & cannot be supplied by any other. And the reason is, that this is the only mode recognised by the public Law of Nations. — (Ryd 136. Chy 90. 2d Ray 993. 6 Mod 8. Palk 131. Bull 271. 2 T. Rep 713. 516. 234.)

This protest is to be made in gent by a notary public: his office being, recognised by the Law of Nations. (1 Thom 164. Chy 90. Medley 281.)

As to the particular mode & form of protest vide (Chy 91. Ryd 137. 2 T. Rep 713. Bull 271.)

Where a Notary cannot be procured in Eng^d Protest may be made by a respectable person in presence of two witnesses. —

Protest must be made where Bly is dishonoured. —

But where

In sending notice to a prior party, a copy of the Protest need not accompany it, tho' it is usual. Notice of the protest is sufft. - (2 H. Bl 569. 1 Esp. 511. 12. Bull 271. 12 Mod 309. 1 Vent 45.)

The protested Bly need not be sent; in fact it need not be done, where notice is to be given to several. Besides the Holder ought to retain the possession of the Bly. for his own security.

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On the non acceptance of an inland Bly there is no prescribed form necessary, to prove the fact. Any act wh evinces the intention of Drawee is sufft proof. - (6. Mod. 1 Salk. 131. 3 id 69. 992.)

It has been said that the Holder must not only give notice of dishonor, but must aver that he does not intend to resort any further to Drawee. (1 S. R. Ch 97. 8.) I. G. does not think it necessary. -

At com. Saw an inland Bly could not be protested: but by Act of 1825 Ann. a protest is necessary, to entitle the Holder to costs, interest or damages: but not for the purpose of entitling him to the face of the Bly. Protest is usual in this country. (Tha 910. Ryd 143. 4. Chy 93. 4.) & in some cases necessary by Stat. -

And a protest on an inland Bly, under these acts, is similar to one on a foreign Bly. (Ryd 150. Chy 94.)

But notice of non acceptance must be given in the one case as well as the other. The form only differs. Where the parties to be notified are not within the immediate neighborhood, notice must be sent by mail. And whether it arrive at the place of destination is immaterial. Holder is then "functus officio". (2 H. Bl 509. R. 221. Chy 95.)

But there is no mail route, notice need be sent ^{only} by the first ordinary mode of conveyance; even tho there shd be a prior accidental one. (2 H. Bl 565.)

And Delay in sending notice may be excused by circum-

the accident: Holder must send as soon as he is able. —

Notice of non-acceptance he must be sent within a reasonable time, to all to whom he intends to resort (2 H. Bl 569. Bull 27. Chy 96. Ky 126. 9. 6 East 3. 1 Camp 248.)

And as to what is reasonable time, the rule is that notice must be sent by the first mail after non-acceptance. — (4 T. Rep 174. 18 Ray 743. 2 Stea 8029. 2 H. Bl 565. 1 T. Rep 168. Doug 197.)

Great punctuality is now required in giving notice of non-acceptance: about a century ago, two months was considered some enough. (1 H. Bl 27. 12 ib. Comb 152. Chy 96.) but now it must be given immediately. —

If the parties to be notified reside in the place where acceptance was refused notice shd be given on the day of refusal (1 T. Rep 169. Chy 97. Ky 126.)

It has been said that this notice must proceed from the Holder himself: but 18 Rayon says notice from Drawee is sufft. I. G. thin Rs it makes no difference. (1 T. Rep 167. Ky 126. Chy 98.)

And it seems that notice by one of the parties, will enure to the benefit of any other party, who may have a right of action agt a prior party: for these parties are respectively liable according to their priority of becoming parties. (Chy 93.)

As to whom Notice is to be given, it shd be to all those whom the Holder intends to hold liable in any event: he cannot recover agt any party, unless he has given notice. —

Hence an indorser will be entitled to notice altho Drawee had no effects in hands of Drawee, and was therefore not entitled himself. —

(5 Burr 2670. 1 T. Rep 712. 1 Vent 45. Chy 26. 93. 9. 12 Rev 202. 3. n. 221.)

Want of notice to Drawee is no defence, to the indorser, if the latter had had notice: Holder has a right to select the party agt whom he brings his suit. (1 Stea 441. 2 Burr 669. 1 Esp rep 334. Chy 99. 203.)

Formerly contra. (1 Sal R 131. 3. 18 Ray 440.)

But the consequences of neglect or want of notice may be avoided by matter ex post facto: thus payment of part of the sum after the dishonor, by one of the parties who has had no notice, is a waiver of the defence arising from want of notice. (Stra. 2 T.R. 713. Bull 276. 1 Esp. rep 57. 2 R. rep 202. Chy 102. 122. 158. 202. 3.)

But it has been held, that if a prior party to whom reasonable notice has not been given, promises to pay the Bk without a knowledge of the non-acceptance, he is not bound by the promise. (5 Bosc. 1 T. Rep 712. Chy 102. 2) This rule has been overruled. Such promise implies an admission of notice, & will support an account in declaration of due notice. (17 East 231. 236. 1 Esp. rep 332. n. 1 Bosc. R. 326. 2 East 469. 2)

But further, a promise by a prior party to whom reasonable notice has not been given, without a knowledge of the legal consequences of the omission of notice, will not bind him. — (2 East 469. Doug 454. 657.)

It has been also decided, that Drawer having paid the money, under these circumstances, he could maintain an action for money had & rec^d from the Holder. — (ib.)

In case of a conditional acceptance, want of notice is cured by the performance of the condition before time of payment. Chy 101. 2. Stra 212. comp 571. 1 T. Rep 182. 2)

But where the condition is complied with & the time of payment agreed on in the condition must be prior to the time mentioned in Bk. otherwise the condition wd amt to an enlargement of time: — and notice wd be necessary

Acceptance Supra Protest. Where a foreign Bk is protested it may be accepted for the honor of any of the parties, (Ky 8152. 156. Chy 22. 103. 142. 163. 180. 209. Bosc. 456. 2) by any Stranger, or Drawer.

This may be done by Drawer; as where he denies his liability to accept

but is willing to do it from friendship &c. (Beaues 458. 17. Rep 289. 1 Port Con.
139. Ry & 153. Chy 103.)

In this case he sh^d immediately send notice to the party for whose honor he accepts. The effect ^{of such acceptance} is to rebut the presumption that wd arise from a simple acceptance, that Drawee has effects of Drawee in his hands. And also to give the acceptor an indemnity on the Bly agt the party for whose honor he accepts, & agt all parties prior to such party: i.e. agt all those vs whom that party might recover. —

But a simple acceptance gives the acceptor no right of indemnity agt any one on the Bly: tho' as agt the Drawee he may recover for money had & rec^d, if he had no effects (Ry & 153. 5. 1 Port C. 139. Beaues 458.)

But the acceptor supra protest acquires no right agt a party subject to the party for whose honor he accepts: for the party himself c^d not have had any right agt him had he paid it. —

If the Drawee refuses to accept, in any form, any third person may accept for the honor of the Bly. He may thus make all the parties his involuntary debtors. (Chy 104. 5. Ry & 153. Carth 129 Beaues pl. 38.) And he acquires the same rights as a Drawee accepting supra protest. —

A Bly previously accepted ^{supra protest} by one person for the honor of one party, may be afterwards accept^d for another party. — (Beaues pl 42. Chy 104.) by another person. —

It has been said that the Holder is bound to accept an acceptance supra protest, when offered. Contra J. G. — the drawer & the indorser engage that Drawee shall accept, & Holder is entitled to such acceptance. and cannot be obliged to receive an acceptance from a Stranger — the moment the Drawee refuses to accept, the Holder's right of action commences. (Chy 104. 12 Mod 410. Ry & 153. 150.) —

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If after an acceptance *supra* protest by a 3^d person, the drawer is willing to accept according to the tenor, this cannot be done without the consent of the Holder (Beaves 457. Ryd 100.)

For form & c. Ryd 153. Chy 105.)

The acceptance *supra* protest is as binding as one in any other form. (Chy 105. Lo Ryd 575. 12 Mod 410. Cor. rep 76. 3 Burr 1472. 74)

The liability therefore of such accepta is the same as that of the party for whom he accepts would have been had that party been obliged to pay. —]

Such accepta is of course liable to Holder — He in fact assumes the same responsibility to a protest wd have subjected the Drawer. (Beaves 457. Ryd 153. 1 Rep rep 113. Chy 105.)

Hence also if the Bly is accepted *supra* protest in honor of any particular indorser, the accepta is liable to all those subject to such indorser — this wd. to prior indorser or Drawer. — (It auct.)

If the acceptance is for the honor of the Drawer, he only is bound to indemnify the acceptor (Ryd 155. Chy 106. 163. 14. ⁴⁴⁹ Beaves.)

Of Transfer. — All Bly containing operative words of transfer, as "payable to bearer" &c. are negotiable in infinitum (3 Mills 24. 3 Burr 1517. 1527. Ryd 63. Chy 47. 8. 107. 8.)

Whether a Bly is negotiable or not is a question of Law, arising upon the face of it. Merchants were formerly consulted; but this practice has been laid aside since the time of Lord Mansfield. — Tho' in case of necessity it wd be allowed. — (2 Burr 1216. 1 Bl rep 295. Doug 603. Watson 253. 7.)

As good a valid transfer can be made only by the payee, or by a person who has derived the legal interest from the payee. Hence an indorser by a stranger cannot transfer

the legal title. (4 T. Rep 28. 1 H. Bl. 607. Chy 110. 121.)

The same legal rule holds of Bk transferable by mere delivery - he only who has the legal title, has in legal title the right to transfer the Bk. -

The operation of the rule is confined however to the case, where the person receiving it knows that the person transferring it has no right to do it. - If the receiver is ignorant of the illegality, the transfer is valid. - Hence, where a Bk is transferable by mere delivery, a subsequent bona fide holder is entitled to recover. (1 Bl. rep 485. Doug 611. 633. Chy 9. 51. 201. 209. 110. 121. 124. 3 Burr 1546. 7 T. Rep 427. 1 Burr 452.) -

He who wrongfully gets possession cannot recover upon it - but the objection is cured by transfer. -

Where Bk is made payable to bearer it is immediately transferable - but where it is payable to "A or order" an indorsement is necessary to make it transferable. -

And after indorsement in full by payee, it cannot be further transferred without the indorsement of the indorsee. -

Hence where such a Bk is lost, & found by D. D. who transfers it to A. A cannot recover: - the transfer must be made by the right payee.

But a blank indorsement by payee, or his indorsee, renders the Bk negotiable for ever, without further indorsements. - (Doug 611. 33. 496. Ky & 39. 205. 6. 1 Esp rep 182. Chy 118.)

This difference in the mode of transferring Bk. arises from the variety of their form. -

The principle on which an indorsement in blank renders the Bk negotiable, is that any subsequent holder may fill it up & make it payable to his order &c. -

A Bankrupt cannot transfer a Bk. - (2 H. Bl. 335. Chy 111. Ky & 107.)

on the death of the Holder the right of transfer devolves upon his personal Representatives. (3 Wils. 1. 2 Stra 1260. 2 Burr 1225. 1 T. Rep 487. 1 A. Bl. 622.)

If a Bly is made payable to A for the use of B, the right of transfer is in A. in act of Law. (Carth 5. 2 Vent 307. 9. Ryd 107. 8. 149. 112.)

Bills are usually transferred after acceptance & before the time of payment: the credit of the Bly is augmented by acceptance.

But a transfer may be made before the Bill itself is drawn. Thus if A indorses his name on a blank paper, B may draw on the other side a Bly, & the indorsement will operate as a transfer. (Doug 576. 1 A Bl 313. 16. 19. Chy 112.)

If a feme sole have a Bly & marry, the right of transfer devolves upon the Husband. — (Stra. 576. 3 Wils 53. 10 Mod 246.)

A valid transfer may be made after the time of payment. — for he who makes it cannot object to the time. (20 Ray 571. 5. 1 T. Rep 430. 3 Burr 1576. 3 T. Rep 80.) It is his own act. — Chy 114. 5.

But he who receives such transfer runs the risk of any equitable defence existing between the prior parties. as if the Bly was drawn without considⁿ & he sue Drawer, this fact may be shewn. (7. T. Rep 423. 1 Wils 230. 3 T. Rep 89.)

If a Bly is indorsed after it has been paid, the indorsement binds only him who makes it, & not the prior parties. i.e. if payment is made at the regular time or at some subject time: for if payment had been made before the time appointed, the parties wd not be discharged. — (1 A. Bl 39. 1 Wils 46. 4 T. Rep 470. Chy 115. 176.)

And a Bly paid in part, may be indorsed over for the residue. — it is then a Bly for the amt unpaid. — 20 Ray 360. Carth 466.

12 Mod 213. 1 Salk 65. 2 Wils 262. Chy 61. 115. 121.)

The mode of transfer is governed by the legal operation of the instrument: & usually, by the terms - but not always: - for the terms & legal operation are not always the same. Hence a Bk payable to a fictitious person is transferrable by bare delivery, as one payable to bearer. And even if it were indorsed, it wd be negotiable. (1 H. Bl 600. Chy 115. 16.)

And where there is no fictitious party in the case, there are two instances where the Bk is transferrable, ~~by mere~~ delivery. -

I. Where it is payable to Bearer. & 2^d Where it is indorsed in Blank, when payable to order: - for any holder may fill up the Blank & make it payable to himself. he then becomes indorsee. - (Sta 537. 1 Burr 452. 3 ib 156. Ry & 88. 4 Esp 210. 1 ib 130.)

Its formal words are necessary to make a valid endorsement - it is sufft that indorser's name be written on the back: and if there be nothing else, it is a blank endorsement (Com. Rep 311. Salk 126. 8. 30.) of

An endorsement may be in Blank, in full, or restrictive. - ^{Indorsement.} Blank
I. Blank endorsement consists in the mere name of indorser. and where the endorsement is intended to transfer the interest, this is usual mode - (Ry & 89. 117.) It is sometimes used merely to empower an Agent. -

But a blank endorsement while it remains so, is of no account: it does not "per se" transfer the interest - It only enables the Holder ^{contra} Chy. 174. to fill it up payable to himself. - The form of filling up, is the shortest possible as "pay to I. S. or order" & it is done often at the moment of trial. (1 Salk 126. 8. 30. 2d Ray 871. 1 Bl Rep 297. Com up 311. Chy 25. 56. Ry & 95. 6.)

Hence while the endorsement remains in Blank, an action may be brought in the name of the indorsee: the title is yet in him. - ^{contra} where the endorsement is in full. (2d Ray 871. Bull 275. 12 Mod 193. 246.) And such indorsee may be witness for the indorser. (Salk ib.)

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While the indorsement remained in blank, the negotiability of the Bk cannot be restrained by any subsequent indorsement transferring the interest. (Holt 296. Ryd 205. 6. 1 Esp. R 113. 132. 3. 4 it 210. Chy 118. 120. 201.)

A subsequent indorsement in full may be struck out & the last indorsee may make himself the immediate indorsee by filling it up to himself. -

This rule does not hold where no interest is transferred, as where a mere authority is given: the agent has no right to strike out the subsequent indorsement (it auct.)

But a Bk payable to order is not negotiable, unless ^{by delivery} indorsed in blank by payee (7 Mod 87. 1 H. Bl 606. Doug 611. 33. 9)

in full
indorsement

An indorsement in full points out to whom the Bk is payable & of itself transfers the interest to the indorsee, unless he is expressly named as agent. -

Hence if payee direct thus "pay to B. or order" the Bk is negotiable only by the further indorsement of B. But if any one indorse in blank, it then becomes negotiable by delivery. -

(1 Esp. rep 132. n. 2.)

And the negotiability of a Bk originally negotiable, cannot be restrained except by express words of restriction: - thus if the words of transfer are omitted "as order be" the negotiability will not be restrained. (Com rep 311. 1 Bl rep 295. 2 Burr 1216. 1 Ta 557.

Doug 617. 637. Chy 119. 20.)

Contrary if omitted in the original Bk.

Restrictive. -

A restrictive indorsement is one expressly ~~restraining~~ the negotiability of the Bk "as pay to B only &c" (Doug 617. 37. Chy 119. 20.)

But a payee or indorsee who has the interest in it, may limit the payment to whomsoever he pleases, & thus stop the currency of it. (2 Burr 1237. 1 Bl rep 299. 1 Atk 249. 4 T. Rep 28. 119. Doug 617. 637.)

A transfer cannot be made after acceptance, for less than the amt due on the Bly: for the acceptor wd be subjected, by splitting up the Bly, to several actions by the diff't holders:— the rule is correct so far as regards the liability of the acceptor: but I. G. thinks there is no principle of Law to prevent the indorser from being bound according to the terms of the indorsement. (Ld Ray 360. Carth 466. 12 Mod 218. SalR 65. Ryd 109. Chy 120.)

But if a Bly is indorsed for part only, before offered for acceptance, & the drawee accepts, he is liable to all the parties indorsed. — He acts knowingly & at his peril: he engages to pay according to the indorsement. (Barrow pl. 266. Chy 120.)

It seems, hence, that Drawer cannot be subjected by such an indorsement, unless it is made before the Bly is drawn. — (SalR 65. Carth 466. Ryd 109. Ld Ray 360.)

But after a part of the Bly has been paid, it may be indorsed over for the residue: it is virtually an indorsement ^{of a Bly} for the sum due. — (2 Wils 262. 1 SalR. 65. Chy 120. 121. Ld Ray 360. —)

To complete the transfer, the Bly shd be delivered to assignee.

With regard to the effect & operation of a transfer, it amounts to the striking of a new Bly: the indorser is virtually a Drawer on the orig Drawer in favor of the indorsee. —

Burr 674. SalR 123. Sta 478. 3 SalR 68. —

Hence a promissory note indorsed, is in effect a Bly, & may be declared upon as such: the analogy commences after the indorsement. —

Dubitative, whether it can be declared upon as Bly, except as indorser. — (6 Mod 29. 30. 4 T. Rep 149. Burr 676. 1 SalR 132. Ld Ray 744.)

If the name of the promisor is forged, the indorser is liable to indorsee, as in case of Bly: — he is drawer of a Bly on the maker of the note. — (Ld Ray 130. SalR 125. 2 Ph 22.)

And this obligation of indorser may be discharged by the neglect of

indorse: as by want of justice of dishonour &c.

The maker cannot be thus discharged, in analogy to the case of Drawer of a Bk.

Chitty says the transfer of a Bk. by bare delivery, for a debt due before a contract at the time of transfer, subjects the party to his immediate assignee, in the same manner as he is liable by indorsement. J. & S. says not - where a party indorses he becomes liable to all subsequent parties on the Bk. But he cannot be subjected on a Bk. to which his name is not affixed - he is no party. - He not undoubtably he liable on the origl consideration, but not on the Bk. (7 T. Rep 64. 12 Mod 244. 408. 521. 2d Ray 928.) 15 East 7. Ryd 91.

But if assignee expressly agree to take the Bk. as payment, the party delivering it without indorsement, is discharged from the debt. - (7 T. Rep 65. 6. Holt 121. Chy 123. 4. 150.)

But where a Bk. is transferred by mere delivery, for a discount, the assignor is liable neither on the Bk., nor for the consideration. -

By a discount is meant a sale of the note for money advanced at the time: not for an antecedent debt, nor for one created at the time - it is a sale, as of any other chattel; and if no warranty is had, the maxim "caveat emptor" applies. (J. Gould.) (1 Esp rep 447. Ryd 90. 91. Chy 109. 123.) What then is the reason of the distinction? In the case of a precedent debt, there is a distinct contract & therefore a distinct ground of action. But in the case of discount, without warranty there is no such distinct cause of liability. Vendor is not liable. -

The liability of the parties to a Bk. is several; hence a discharge of Drawer does not discharge an indorser. (4 T. Rep 825 Chy 124. 155. 182.)

If the Holder of a Bk. transferrable by delivery, loses or is robbed of it, & it comes into the hands of a person ignorant of the fact, for

valuable consideration, before payment, he may recover upon it. Can't as to robber or forger. - (Talk 126. 3d 71.)

Hence where a party has a Bly, wh he wishes to send ~~to~~ as payment of a debt, he ought ~~not~~ always to fill up a Blank indorsent. - This may prevent a transfer in case of loss or Robbery. -

But where a lost Bly is paid out of the usual course of business, the Drawee may be compelled to pay it over to Loser: - Thus if he pays it before it is payable by the terms of it. (1 Esp 40. 1504. Chitty 150. 1. 125.)

If a Bly transferable by indorsent only, is transferred by a forged indorsent, the indorsee acquires no title; nor can a subsequent bona fide holder recover agt any party prior to the forgery: - every receiver must run the risk of forgery: the Law cannot guard agt this. -

Hence the Drawer may recover of acceptor, altho he has paid it. No man can lose his rights by the forgery of another. - (Arg 125. 6. 151. L. J. Rep 28. 1st 607. Doug 617. 37.)

It is a rule of the public Mercantile Law, ^{that if a foreign ac- 1820. 20.} ceptor loses the Bly, he must give the Holder a promissory note for the amt, ^{& payable at the same time 1826.} and it makes no difference whether he has accepted it or not. Same rule, if he pays to a wrong person. - And if he refused to give the note, the Bly must be protested. - This rule seems to apply only to foreign Bly. (Beaumes pl. 98. Chy 128. Bull 271.)

And in all cases of a Bly ~~lost~~, if the Drawer will not give a new one, a protest for non acceptance or non payment ~~may~~ be made, & after time of payment has elapsed, an action by the true owner may be ^{his} brought.

If the Drawee absconds, the Holder ought to protest the Bly for better security. and shd give notice. (180 Raym. 743. Chy 128. 9. Beaumes pl. 22. 4. - 5. 7. 9.)

This rule however, relates to a Bly previously accepted, and a subsequent absconding: - for if Drawer had absconded when he presents the Bly, it may be protested. -

This security is given by a third person who engages to be bound in the same manner as the acceptor. It is in the nature of a second acceptance for the honor of the acceptor. (Com. D. Mer. 7.3. ch. 129)

These two rules apply only to foreign B^l (trav): for they are predicated of B^l protested. -

Presentmt for Paymt. Whether there has been a previous acceptance or not, it is a genl rule, that Holder must present the B^l to the Drawee for paymt at the time appointed. - And if there be no fixed time, within a reasonable time. -

If then Drawee has refused this does not excuse Holder: for paymt may be made tho' acceptance was refused. 7 T.R. 581. 2 Burr 669. 127. 128. 1087. 2 Bl. 470.)

And if presentmt is not then made Holder loses his remedy agt the prior parties. - (ib.)

If in the mean time, Drawee is dead, presentmt must be made to his personal representatives. -

A neglect to present within the time required may be excused as in the case of neglect of notice of non-acceptance. - as if Drawee has absconded, a Drawer has no effects in hands of Drawee. -

The acceptor himself cannot defend on the ground of neglect to present - it is an indulgence to him (Dong 236. 247. 1 Esp. 46. ch. 126. 133.)

According to some opinions an action will lie vs acceptor without presentmt for paymt: the action being, sufft notice, as in case of bond, or promise. (Chy 133. 10 Mod 38. Bayley 78. n.b. 108. n.a.)

Hence Holder is bound to present, only for the purpose of subjecting the prior parties - the acceptor has previously bound himself. -

But D. G. thinks rule incorrect - the B^l is negotiable indefinitely and acceptor cannot know any more than a stranger who the Holder is - he cannot find him out unless he applies to the Holder

who presented it, & he is not bound to inform him: the acceptor need be put to endless trouble & vexation. — (1 Sta 222. arg^t 1 claimd 93. Chy 133.)

It seems to be agreed on all hands, that if acceptor agrees to pay on demand, or such a time after demand, he may insist on the omission of presentmt for payment. — (2 Show 235. Chy 134.)

Presentmt for payment ^{may be made} by the Holder or his agent: and the party presenting, must be competent to give a legal acquittance. — (1 Esp. rep 115. 134. 1 T.R. 167. 10 Mod 286. Pe. Rep 179. 80.)

J. G. does not see the necessity of the competency: be: for the acceptor has no right to say that he will not pay unless he receives an acquittal, any more than any other debtor. — vide post

due gent presentmt is to be made to Drawer — but it is no gent sufft to present at his dwelling house, if he is absent, or no other place appointed — if there is a place appointed, presentmt must be there made. — 2 H. B. 509. 2 Esp. rep 372. 12 Mod 241. 1 Esp. rep 4. Com. L. North. T. 7. —

If the place appointed is the Holders house, there is no need of a formal demand — inspection of the Books is said to be sufft: a piece of down right child's play (J. G.) (2 H. B. 509. Chy 135)

If the acceptor has removed, Holder shd enquire after him & present to him there (1 Sta 1087. Chy 70. 136.)

If the acceptor has absconded, Holder is not bound to search for him — whether he has gone out of the state or not makes no difference. —

But if he has merely gone abroad, presentmt at his dwelling house is sufft. (Ld Ray 704. Kyd 125. 7. 1 Esp. rep 511. Chy 136.) & necessary. —

As to the presentmt to prior parties, no demand on Drawer is necessary to subject an indorser, & no demand on an indorser is necessary to subject a subsegt one: — as to the Holder, the liability of the Drawer & the indorsers is coordinate — tho' as between the Drawer & the indorsers there is a priority of obligation: — but they are all equally liable to Holder. —

Days of
Grace

Where a Bt is made payable, at usance, or on a certain day after sight, ^{or date} the Bt is not payable on the day mentioned in the Bt, but (3) days of grace are usually allowed, & presentmt must be made on the last day. - (L.T.R. 170. Chy 143. Ryd 9. 121. 5. 1 Esp rep 59.)

Days of grace were formerly gratuitous, but they are now demandable of strict right, granted & confirmed by long usage. -

But where Bt is made payable "at sight" or ^{per qu} on demand, days of grace are not allowed: Bt are usually drawn in this way only for the accommodation of travellers, who want the money without delay. - (Beames pl. 255. 1 Thom 163. Ryd 10. Davin^{iten} 153. chy 137.)

In some of these states grace has been allowed on these Bt. - (1 Chm. cas 328. Carnis rep 343. 2 Chm. erra 195. 4 Dall 147)

The number of days is regulated by the Law of the place at wh it is payable: in Great Britain & U.S. they are 3. on the continent. 5. 6. & 10. &c.

If a Bt is drawn payable on a certain day, after date, sight, or at usance, the day of the date is excluded in the computation of the time; i.e. the day after the date is the first day counted. - (Ld Ray 280. 6 T. Rep 212. Beames pl 252. chy 138. 143. contra Foster² 40.

This rule is opposed to the rule of the Com. Law: in a coat or bond the day of the date is ~~excluded~~ included: and this is absolutely necessary in the conveyance of a freehold: otherwise it wd be made to commence "in futuro."

(2 Vent 308. 310. 3 T. Rep 623. Corp 7/4. Pom. Romas. 48.)

And this distinction is to be observed. - If an obligation is payable at a certain time "after date", the day is included: but if it be at a given time "after the day of the date" it is excluded, i.e. At Com. Law. But the Law Merchant recognizes no such distinction - the day of the date is in all cases excluded. - But even at C.L. the rule excluding the day will be dispensed with "ut res magis valeat de" as in case of a freehold. ^{et ex necessitate rei} _{whosaa.}

If a B^{ly} payable at a certain day after date, sh^d actually have no date, the time is computed from the day of delivery, excluding that day. - (2d Ray 1076. 4 T. R. 337. Com. D. Hart B. 3. Bac ab. Leese. L. 1.)

If then a B^{ly} is made payable on Monday, demand can not be made till Thursday. -

Sundays are included in the computation - but if it sh^d be the last day, demand sh^d be made on Saturday. Same rule of High days & Holydays. (Sta 829. Ry & 120. Chy 141.) as Thanksgiving &c

In any other case a presentment before the last day wd be void & nugatory. (1 Esp 261. Chy 141.)

Foreign B^{ly} are usually drawn at "usance", or two or more usances.

Usance is the customary time fixed by usage for the payment of foreign B^{ly}: it is equivalent to saying, "pay at the usual time at wh^{ch} foreign B^{ly} are payable" (Chy. Ry & 141.) it designates a certain period of time settled by custom, at wh^{ch} B^{ly} drawn in one country are payable in another - a B^{ly} drawn in London payable at Amsterdam at usance ^{means 3 months &c} -

If a B^{ly} is payable at a month after date, the computation is Feb^y 21 by calendar & not lunar months. Here the rule varies again from that of the com. Law. (Chy 143. Ry & 4. 6.) 2 Bl Com. 141. 6 T. Rep 224. 2 East 333.

If a B^{ly} is payable at 30 days after sight, the days are computed from the day of acceptance or refusal (Com. D. i. Merc. 4. 7 6 T. R. 205. Chy 144.)

Where no time is appointed, a reasonable time is intended. (Sta 415. 508. 1 Bl rep 1. 168. Ry & 45. Doug. 515. 2 H. Bl 565. 8. 9.)

The day of presentment being ascertained, presentment sh^d be made within a reasonable time before the expiration of the day, and where business hours are established, within such hours. (Chy 148. 69. Ry & 125.)

Payment sh^d be made to the owner of the B^{ly} or his agent. -

Chy 145. Poth. pl. 164.)

Where a Bk is payable to the order of A for the use of B, payment shd be made to A. (2 Vent 310. Carth 5. Ryd 107. 3.)

The genl rule is said to be that where money is payable on a day certain, the party bound is indulged to the last moment of the day. (4 T. R 173. 1 Saund 287. Chy 153.)

But as to foreign Bk, this rule does not hold - for protest must be made on that day - and recourse payment must be made in season to allow time for making the protest. -

In inland Bk, there is not this necessity. (Ryd 121. Chy 96. 7. 153. 2.)

But it has been doubted (Ryd 101. 4 T. R 174) whether even an acceptor of an inland Bk, can claim the whole day: inconsistent with the law of tender - for it is held that tender must be made within such a time before dark as to enable the receiver to examine the money by daylight: - besides, where hours of business are established it ought to be made within those hours. -

If the holder compounds with the acceptor, without the assent of the other parties, they are forever discharged: for if holder has accepted 50 ps. st. the acceptor is discharged. - Chy 155. 168. 608 R. Bank. & Law 160.) Drawer c'd not recover the difference from acceptor. -

If the holder receive a less sum, by way of part payment, the prior parties are discharged. (Ld Ray 744. Sta 745. Bull 273. Chy 155.) contra J. G. the reason assigned is that he shows his election to receive of the acceptor, nonsensical - the act shows nothing more than that he is glad to get what he can - & it is advantageous to the prior parties, whereas the only principle on wh. they are ever discharged by an act of the holder is that they are prejudiced (Bull. N. P. 277. 2. 5. Chy. 608 R. Bank. & Law. 167.)

It is said to be a doubtful point whether a party bound

by a coat, bond or Btly can insist on a discharge as a condition of payment I. G. thinks not. It is unreasonable no doubt on the part of the creditor, but the question is on what principle of Law is he bound to do it: there is no such stipulation in the contract. (Chy 157. 134. Pr. rep 179. 80. 2d Ray 742. Doubtful.) Contra 2 H. Bl. 31. Pr. rep 179. 80.)

A genl receipt on Btly not expressing, by whom payment was hence, if drawer or indorser pay, he shd express it on the Btly. Pr. rep 25. Chy 209. 157. 8.)

If payment is refused on presentment, the holder must give immediate notice of nonpayment - or a protest in case of foreign Btly must be made & notice sent with a copy of protest. - Otherwise the prior parties are discharged. (Chy 158. 202.) But this rule has been denied by Judge Van Ness (Law Journal 11) I. G. says it is settled that in case of non acceptance, notice is necessary, & a fortiori in case of non payment. The point has not been settled however. -

If the Btly is only partly paid, notice of refusal or protest, as to the residue must be made, unless waived or excused. -

Protest for the non payment of a foreign Btly must be made on the day of refusal - & notice sent as soon as possible. (1 T. R 174. 2d Ray 743. Ryd 126. 1 T. R 168. Sta 829. 2 H. Bl 536.)

In the case of an inland Btly, notice cannot be required till the day following the day of refusal - for acceptor is allowed 24 hours. (1 T. R 170. 1st. 168. 9. 1 Chy 162.) to examine his accounts &c. (ante)

Notice must be sent by the first regular conveyance: or the parties will in genl be discharged. (Doug 515. 2 H. Bl 565. 1 T. R 162.)

When a Btly, foreign or inland, is dishonoured by non payment, payment may be made "supra protest" for the honor of Drawer &c. (Chy 163. Ryd 152. Bawles 456.) some confusion attending the rule - no protest is essential to an inland Btly - how then does it apply to those Btly. - I. G. knows of no explanation unless it be that tho no protest is necessary,

He is entitled to the Btly wh is prima facie evi of payment - 2d side he may call in witnesses to prove the fact of payment. -

Secus as to Drawer & Indorser.

to bind the prior parties, yet it may be necessary to ^{authorize} ~~bind~~ a person paying supra protest to recover of the parties.

When Drawee has made a simple acceptance, he cannot afterwards ~~pay~~ in honor of any indorser supra protest. - (Beaves pl 57. Chy 163.) he was before liable to such indorser as well as to all the other parties.

But if Drawee has had no effects of Drawer, he may, even after a simple acceptance, pay for the honor of Drawer, and acquire a right of recovery on the Bly. (Chy 164. 105. 115. 122. Esp rep 113. 1 Port. Cont. 139. 15 Rep 269. Ryd 153. 5) there is a plain reason why there may be this distinction between a Drawer & indorser. - for as between Drawer & Drawee the relative rights & duties depends entirely on the fact whether Drawee have or have not effects of Drawer - Drawee wd have a right to recover of Drawer without this payment supra protest - the form of the action only is altered. - In the one case it wd be for money had & rec^d in the other, on Bly. ^{the}

Payment for the honor of a prior party shd not be made till after protest - (Beaves pl. 53. Chy 105. 163.) ^{quiescs such party till protest} no right can be ac-

If however the acceptor for the honor of a Drawer or indorser has rec^d the approbation of such acceptance he may pay without a protest - such acceptance amounts to a tacit engagement that the party for whose honor the payment is made is bound to indemnify the acceptor. - (Ryd 154. Chy 164.)

These rules in relation to payment supra protest by Drawee, apply equally to Strangers. (Chy 164.)

End of Bills of Exchange paper. -

of Promissory Notes.

In genl, the principles wh govern the rules of Bly apply, mutatis mutandis, to promissory notes. —

A promissory note is ^{direct} ~~an~~ engagement ^{in writing} by one person to pay a sum of money to another, or to his order, or to bearer, at a fixed time. —

2 Bl. 467. Ry & 18. 35. chy 165.)

Substantially, such a note is analogous to a Bly drawn by the maker upon himself — the words "order" are intended to mean an obligation to pay to the order of the payee. —

Such notes are not negotiable at Com. Law. Ry & 18. chy 165. 6. I. G. does not see why a note payable "to A order" is not negotiable. supposes the objection to have been "maintenance." —

In Law, these notes are not deemed instruments on wh to found an action, ^{per se} but as mere evidence of a parol contract. — (Salp 129. Ld Ray 757. q. 3 Burr 1520. 4 T. Rep 157. chy 166.)

But a Bly, except as between the parties in immediate privity, is as solemn, & fact more so than a bond. —

By the Stats 4 & 5 Anne, however, these notes were made negotiable precisely as a land Bly. and are subjected to the same rules. — These stats, confirmed by the 7 Anne, converted them into instruments. — Ry & 19. chy 167. q.)

They are probably negotiable throughout these United States. — In Conn. a note under \$35 is not negotiable. —

Days of grace are allowed on promissory notes. (Doug 61. 3. Meadows Mayr 4 T. R 152. Bull 274. chy 169. Ry & 121. 5. 1 T. R. 167. 1 Conn. 329. 2 B. N. 12.)

A promissory note when indorsed becomes a Bly: there are then three parties — the indorser in the place of Drawer — the maker is acceptor — the indorsee is payee. — (1 Burr 676. Ry & 34. 5. chy 170. 187. 8. 14.)

Feb. 22.

Got high at
Methuen
19 fellows in the
same situation
from Canada
de la patrie.

Bank notes are then akin to the stock authorizing Banks: they are usually payable to bearer, & on demand. (c. 415. 550. Ld. 149. Salk 283.)

They are not treated as securities but as cash: hence they will pass in a will "eo nomine". They are not actually money, ^{but} for most purposes are treated as such - they constitute a circulating medium. Burr. 457. 1 T.R. 574. 6 id. 385. -

To some purposes however they are & must be considered securities: as where a Bank note is presented to a Bank, an action will lie on it as upon a bond. -

But an action for money had & rec'd will not lie for Bank notes: it will lie for nothing but what is legally deemed money. (Comp. 97. 1 H. Bl. 239. 2 Bl. rep. 1269. 634. 5 Burr. 2589. 3 East 169. Esp. di. 99.)

The rule as laid down is that the action will lie for money had & rec'd if the finder has received money for them. But Judge Gould thinks the rule ought to be unqualified. -

A tender of Bank notes is valid unless the creditor objects to them as not being money - (3 T. Rep. 554. 1 Esp. cas. 318. Chy 172. Doug 662. 2 Bos. & P. 528.)

No particular form of words is essential to the validity of a Bank note - a promissory note is good. (Chy 173. 8 Mod. 362. 1 Ka 629. 786. 2 Atk 32. Ld Ray 1396.)

But the mere acknowledgment of a debt without words amounting to a promise, will not operate as a promissory note: hence the common men's "I owe you \$50" or "I. O. U. \$50." is no note; tho' it wd be good evidence of indebtedness. - (1 Esp. rep 426. Chy 273.)

The essential requisites of a prom^t note are the same as those of a Bk: it must be payable at all events, and in money only. - 1 Ka 1157. 1271. 7 T.R. 733. 4 T.R. 149. 5 T.R. 486. 4 Mod 242. 1 Burr 323. Contra 2 H. Bl 382. - Ry & 50. -)

It is said that an action will lie on the note as between

the promise & promisee - but it can answer no purpose - might as well declare on promise. - (7. T. R 243. Chy 48.)

The Stat of Limitations fixes 6 years as the time for bringing the action on negotiable notes - & in Comm 17 years for those not negotiable.

Assumpsit is the usual remedy on these instruments; and between the parties not in immediate privity it is the only action. -

But as between maker & payee Debt will lie. - (Chy 179.)

The Holder may in genl maintain assumpsit vs Drawer or either of the indorsers - severally - (4 T. R. 471. Chy 179.) 7. T. R 64. Ld Ray 923. 12. Mod 244. 603 521. Sta 515. 516. 15 East 7. Chy 180. 122. 3.)

But no action can be maintained on the instrument of a person whose name is not on it - tho' he may be sued for the consideration by his immediate assignee. - (ib. ant.)

And if Drawee having accepted afterwards refuse to pay, Drawer if compelled to pay, may maintain an action vs Drawer on the Bly. -

⁽¹⁹⁶⁾ Chitty says he may maintain an action for "non acceptance" on the Bly: but it is impossible to sue him on the Bly, for he is not a party. [in the old edition - correction in the new]

Any party who has been compelled to pay, may maintain an action vs a prior party. But an acceptor can never sue any party - unless it be Drawer or consid^r if he has no effects. - (7 T. R 57. Chy 180.)

The rights of an acceptor *supra* protest have been explained before. -

In genl an action will not lie on the Bly vs one who became a party after the Holder (4 T. R 470. Chy 181.)

The liability of the acceptor being primary, he can recover vs none. -

And an action will not lie vs the party from whom plff immediately recd Bly, unless he has paid value: - want of consid^r is always a good defence as between parties in immediate privity. - (7 T. R 121. 571. 351. Doug 514. 1 Bos & P. 651.) 2 Bl Com. 446. Contra. overruled. -

And hence it follows, that between such parties, no more can be recovered than was paid. - But if note be indorsed over, the indorsee may recover the face of the Bly. (2 Phil 22. n.b. 2 Johns 361. 13 it 52. 15 it 44.

The holder may at the same time maintain several actions vs all the parties - but he can recover only one satisfaction. -

And on his recovery, proceedings will be stayed upon Defts paying the amt of the Bly & costs of suit. ^{16. 98.} Kyd 112. 1 Mit 46. 3 Mod 86. 4 T.R 691.

And if in an action vs Drawer a Indorser, Deft pay the amt of Bly & costs, all proceedings vs him will be stayed - he need not pay the costs of the other suits. - (4 T.R. 691. Ska 515. Chy 193. Contn Kyd 198. 2 Bl rep 749. overruled. -

But acceptor can stay proceedings only by paying the costs of all the actions accrued: for he ought to have prevented the whole. - (4 T.R 691. Ska 515. Chy 193.)

The holder having recovered judgment agt all the parties, he may have a ca. sa vs the whole - but he can take out only one fi. fa. Ska 515. Chy 193.) for taking the body is only a pledge - but taking the goods is a satisfaction. - But if one fi. fa be not sufft, he may have a second on a return of the first. -

of the Declaration. -

The Holder may in genl found an action on the Bly or on the consdⁿ. (3 T.R 174. Kyd 177. 58. Burr 323. ¹⁵⁷⁶ 2611. Corp 332. Chy 184. 283. 48.

In declaring on Bly it was formerly necessary to plead the custom of Merchts. - not practised now - nor was it ever necessary. -

(2 S Ray 21. 175. 1542. 38. Carth 33. 267. 270. Chy 184. 5. 284.)

In declaring on promissory notes it was customary to state that the declⁿ was authorized by stat of Anne (Chy 185. Ch 246. 1.) - And in Engd it is still practised. -

In a count on the instrument it is not necessary to allege

consideration - that is presumed, and as between strangers, the presumption is irrebuttable. - (Ky & 48. 4 Pl rep 445. 1st. 487. Ld Ray 758.)

It is never necessary to make perfect of these instruments. (1 T. R 338. 1 Sid 386. Chy 185.)

When the form & legal effect of the note vary, it sh^d be pleaded according to the legal effect. This rule applies particularly to B^{ly} payable to a fictitious payee, a order; wh^{ch} must be counted upon as a B^{ly} payable to bearer. (3 T. R 173. 330. 5. 282. 481. 643. 1 N. Pl 313. 567. 2 ib 194. 288. Doug 667. 80. Chy 48. 58. 185. 7.)

It is said not to be indispensable in declaring on a B^{ly}, to allege an express subseq^t promise - it is suff^t to shew the parties - their liability - how they became sove - for the drawing of B^{ly} amounts to a promise to pay it. - I. b. contra. all that is shewn by such act is indebtedness - & that raises an implied promise, but still such promise must be alleged in the declaration. - (Carth 509. 1st R 128. Ky & 196. Ld Ray 538. Chy 1867. 236.) As in the case of Assumpsit. -

The indorsee may declare as indorsee as the orig^l Drawee. - This is confined to the immediate indorsee. - But where the instrument is in Blank any holder however distant may declare as indorsee in same way - for he can fill it up to himself & thus make himself the immediate indorsee. (Chy 187. 3. 17 on 1264 T. R 149. Burr 674. Ld Ray 743.)

In an action on Drawee or any indorsee, plff must allege presentmt for paymt - and also that notice has been given, where necessary. -

- And as the case may be, presentmt for acceptance, & notice of refusal - as in the case of B^{ly} payable after sight &c. - The omission of these allegations is a defect incurable by verdict. (Doug 671. Chy. 188. 9. 202. Burr 2670. 1 T. R. 712.)

On the common counts the instrument is in some cases good evidence of Deft's indebtedness - but deft may rebut the evidence. -

(1 Esp rep 426. 2 Sta 725. 1 HX 602. chy 189. 190. 2. 173.)

Suppose for example payee assign to B for purchase of goods - B sued in assumpsit for the goods - the note is evidence of indebtedness. -

(3 T. Rep 174. 2 Nov 571. chy 189. 203. 4.)

On the common counts plff may go into proof of consideration wh he paid for the Bly: - for the common counts are founded upon that consideration; the considⁿ is not merged by the assignment of a Bly as in the case of a bond or specialty: the Bly or note is more evidence of lateral security. - (3 T. R 174. 7. it 241. 1 Esp rep 245. 1 East 58. Sta 77 Bull 137.

On what principle are these money counts sustainable? -

It is a rule that where there is a special agreement wh will support ass^t, whether written or parol, the action must be founded on that agreement - why then shd not the Bly be the foundation of these actions? It is because the Bly is a distinct contract & does not show that there has been goods sold &c, & does not contain the orig. contract. -

If the Drawee not having effects of Drawer pays the Bly, it is evidence of money paid laid out & expended for the use of the Drawer - and he may recover, upon proof that he was not indebted - for his acceptance raises the presumption that he was indebted, wh he must therefore rebut - the onus probandi is upon him. - (1 T. R 269. 7 it 576. 1 Esp rep 332. chy 29.) this rule supposed a simple acceptance - the presumption can be raised from no other. -

A Bly is *prima facie* evi^d of money had & recd for the use of the Holder, by the Drawer - how does this appear? it is presumed that Drawer has recd money from payee to the use of any person whom the payee may appoint - the Bly being negotiable. - (1 H. R 283. Burr 1516. Bayley 95. chy 191.)

principle
not so
evid. 2. 8.

A simple acceptance has been said to be *prima facie* evi^d of an acct stated between the acceptor & Drawer (1 H. R 239. chy 191.)

of the Evidence.

The rule in this action as in every other is governed by the pleadings - the probata must follow the allegata. -

Where the action is vs the acceptor, proof of acceptance is necessary - whether in writing or parol is immaterial - and if the acceptance was by an agent, it will be necessary to prove that such agent was duly authorized. - (1 Esp. rep. 14. 15. Chy 24. 2007.)

Where the action is vs Drawer or Indorser proof of the drawing &c must be made, & the usual mode is by proof of their handwriting. -

But confession out of court is sufft evide of the fact of the party confessing, & agt no other. (Sta 1051. 399. (1 Esp. rep 135. Sta 648. Pr. rep 16. Ld. Ray 137b. 1542.)

If an action is brought by an indorsee vs acceptor, the plff must prove not only the handwriting of the acceptor but of the first indorser, and as the case may be of the subsequent indorser: as where there is a number of successive indorsements in full; otherwise it is impossible to prove the title of the Holder. But where the indorsement is in Blank there is ^{no} necessity of this - he can fill up the 1st Blank indorsement in his own name. (1 Esp. rep 180. 1 T. R 604. Doug 630. 653. Pr. rep 20. 225. Pr. ind. 220. Chy 201. 9.) The rule is the same if the suit is vs Drawer. - (it)

If the payee is proved to be fictitious, the Holder tho' he holds apparently under an indorsement, is not bound to prove it - it is impossible: - he must proceed as if he had recovered on a Bill payable to Bearer. (3 T. R 182. 481. Chy 201. 2. 187. 1 A. Rl 313. 386. 569. 2 ib 194. 288.)

Where the action is vs Drawer or Indorser, ^{proof of} due diligence to obtain payment from Drawee or acceptor ^{is necessary} - their liability is but secondary. - (Com. rep 579. 5 Burr 2670. 1 T. Rep 712. Chy 202.) 1 A. Rl 565. 7 T. Rep 581. 2 Burr 669. 2 Sta 1007. Chy 210. 202. Ryd 117. 120. 125.)

Notice of dishonour must also be proved. - (5 Burr. 2670. 1 T. Rep 713. Chy 202.)

And in the case of a foreign Bly. a protest must be proved - but the protest proves itself - like a record - all that is necessary is to produce the Protest. - (2 T. R 713. 5 ib 239. Ld Ray 993. Bull N.P. 270. Pe. rev. 74. n.)

But these rules do not apply as to Drawer, when he had no effects in hands of Drawee. (Chy 68. 87. 101. 132. 202. -)

In an action of Indorsement, it is not necessary to prove a demand on Drawer - for he is not liable before the Indorser.

(Sta 441. Com rep 579. 2 Burr 669. 1 Esp rep 334. Chy 203.)

Contra SalR 131. 3. Ld Ray 440.)

If an indorser who has been compelled to pay, sue acceptor, Drawer or prior indorser, he must further prove that the Bly was returned to him & that he has paid - otherwise his own indorsement shews that the title is not in him. - (Ld Ray 742. 3. Chy 203. 9.)

If the acceptor of an accommodation Bly sue Drawer he must prove payment or something, equivalent as imprisonment. - And also that he had no effects &c. (3 Mills 18. Ryd 156. Chy 203.)

Where Drawer sues acceptor under a simple acceptance, he is not bound to prove that he had effects - the presumption of Law is that he had effects. (1 T. R 406. 9. 3 ib 182. 2 H. Bl 612.)

It has been decided that an indorser is not a competent witness to impeach the validity of the Bly - ex. gr. the holder sues Drawer, now the Indorser cannot be allowed to prove that it was given for a usurious consideration: much disputed - decided both ways in U. S. (1 T. R. 296. 3 T. R 36. Chy 202. Pe rep. 40. 1 Esp rep 176. 1 Day 17. 301. 1 Cases 253. 267. Contra. 7 T. R 601. 1 Esp rep 10. 85. 298. 332. Pe rep 6. 52. 224. 1 Conn. 260.)

Pfff must in genl shew the Bly - unless he proves loss &c. - (R. rep 165. 12th
rep 50 & Ray 731. Chy 205. 6.) secondary evidence is then admitted. -

In an action of acceptor, if he accepted after the Bly was drawn,
the pfff is under no necessity of proving the drawer's handwriting; the
acceptance admits that fact. - (Sta 442. 648. 946. 1 Burr 1354. 1 BL
rep 390. 7 T.R 604. 12. Salk 127.)

In such case then it is no defence that the Bly was a forgery. -

Where pfff claims as holder of a Bly by mere delivery, the mere
production of it is in genl sufft evd of his title, except where he took it
under suspicious circumstances (Chy 209.) as after it became due &c

But where he claims as indorsee, he must shew his title by
the indorsements: & in no other way. - (ib.)

In an action on a foreign Bly, protest proves presentment for
acceptance & payment & also refusal of drawer. - (C Bull St. P 270. 4 T.R 175:
R. 20. 74. n. Chy 160. 210.)

Where notice is sent by letter, proof that the letter was put in to the
post office, or left at the party's dwelling house is sufft proof of notice. -

But in order to let in evd of these facts, deft or his Atty must have
previous notice to produce the letter. (2 H BL 509. 12th rep 5. R. rep 165.
R. 20 107. Chy 95. 210.) -

In many cases Debt is brought on these instruments. -
It was formerly the only action - assumption being ⁱⁿ known. -

There were some difficulties to the introduction of Debt on simple
contract - as wages of serv. - and the rule that pfff must recover the
precise sum due & for - now both removed. -

When ever a genl money count will lie, it may be said
that Debt will. (Doug 6. 2 BL rep 1221. Doug 703. 1 H BL 249. 550.
3 BL. Com. 155.) -

Chitty says this is the common action - doubtful I. G. usually admits

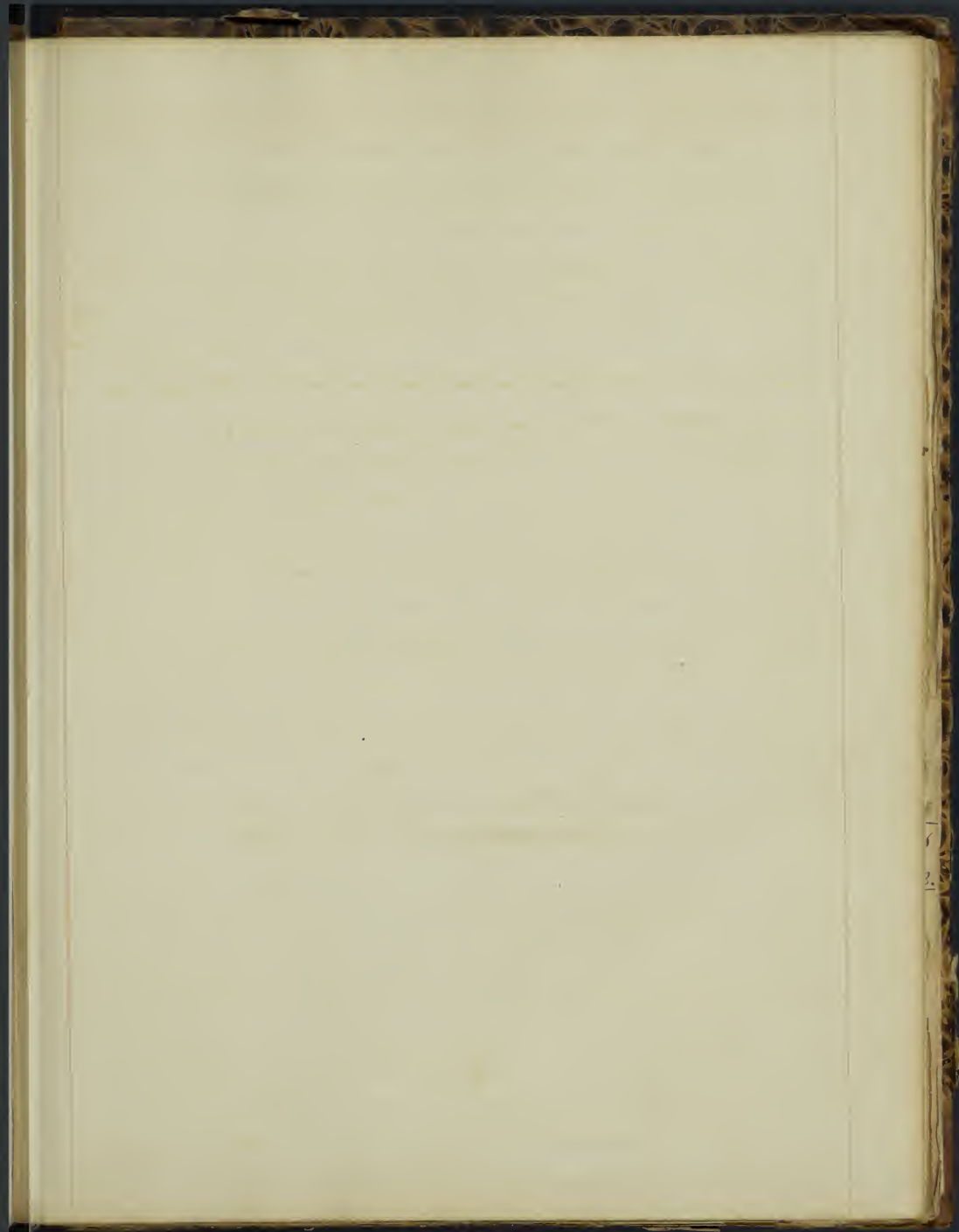
Debt will not lie on Bk in favor of payee or acceptor. (1 Will 185. Hard 485.) because there is no priority of contract. I. G. discounts - there is a priority between them - the undertaking of the acceptor binds him to pay according to tenor - which directs the money to be paid to the payee or any person who may be the lawful holder: besides Assumpsit wd not lie without priority (old Ray 88)

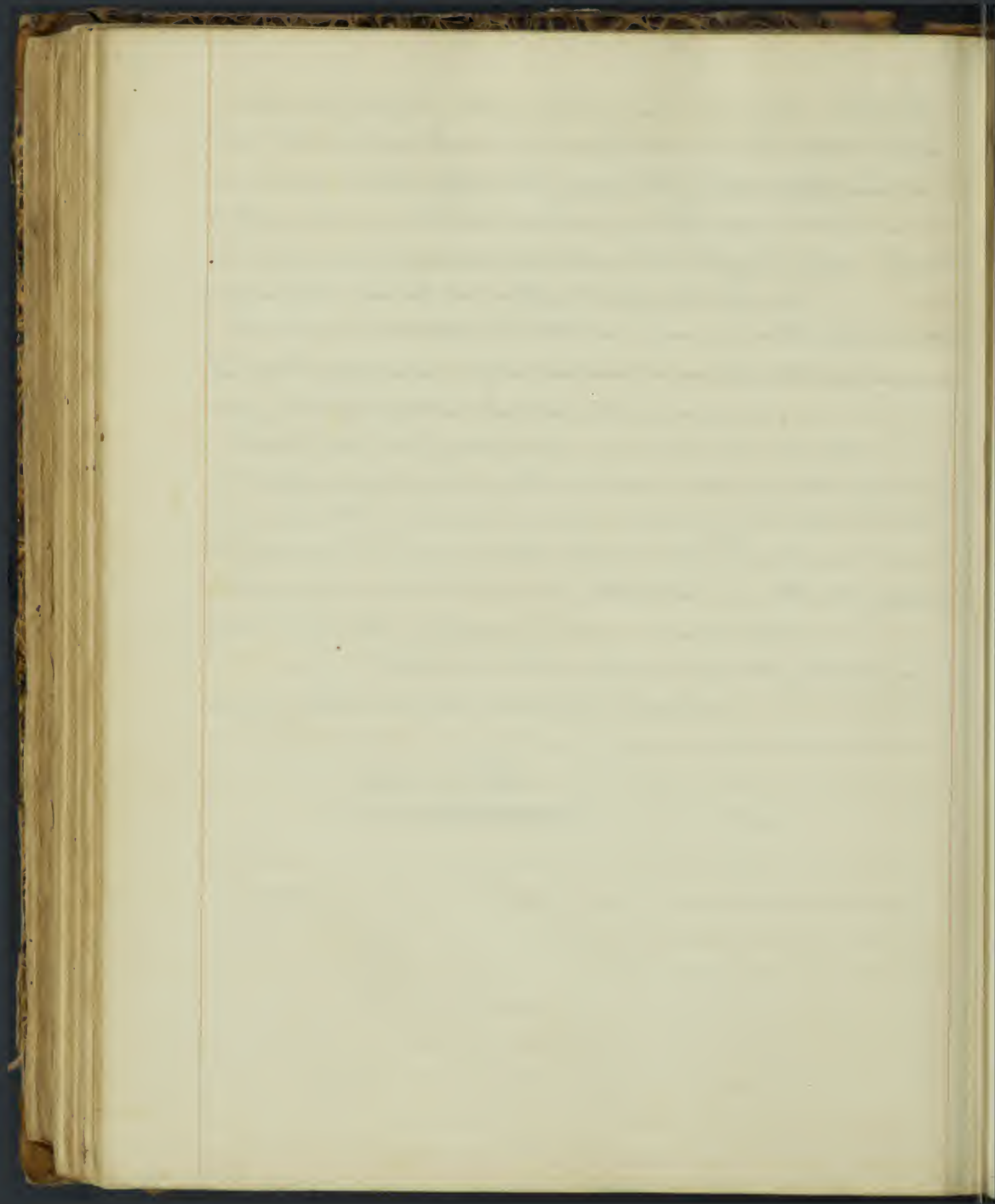
The case is analogous to the case of an advertisement for a reward. the person advertising is to be considered in priority with any human being who accomplishes the object of the advertisement. -

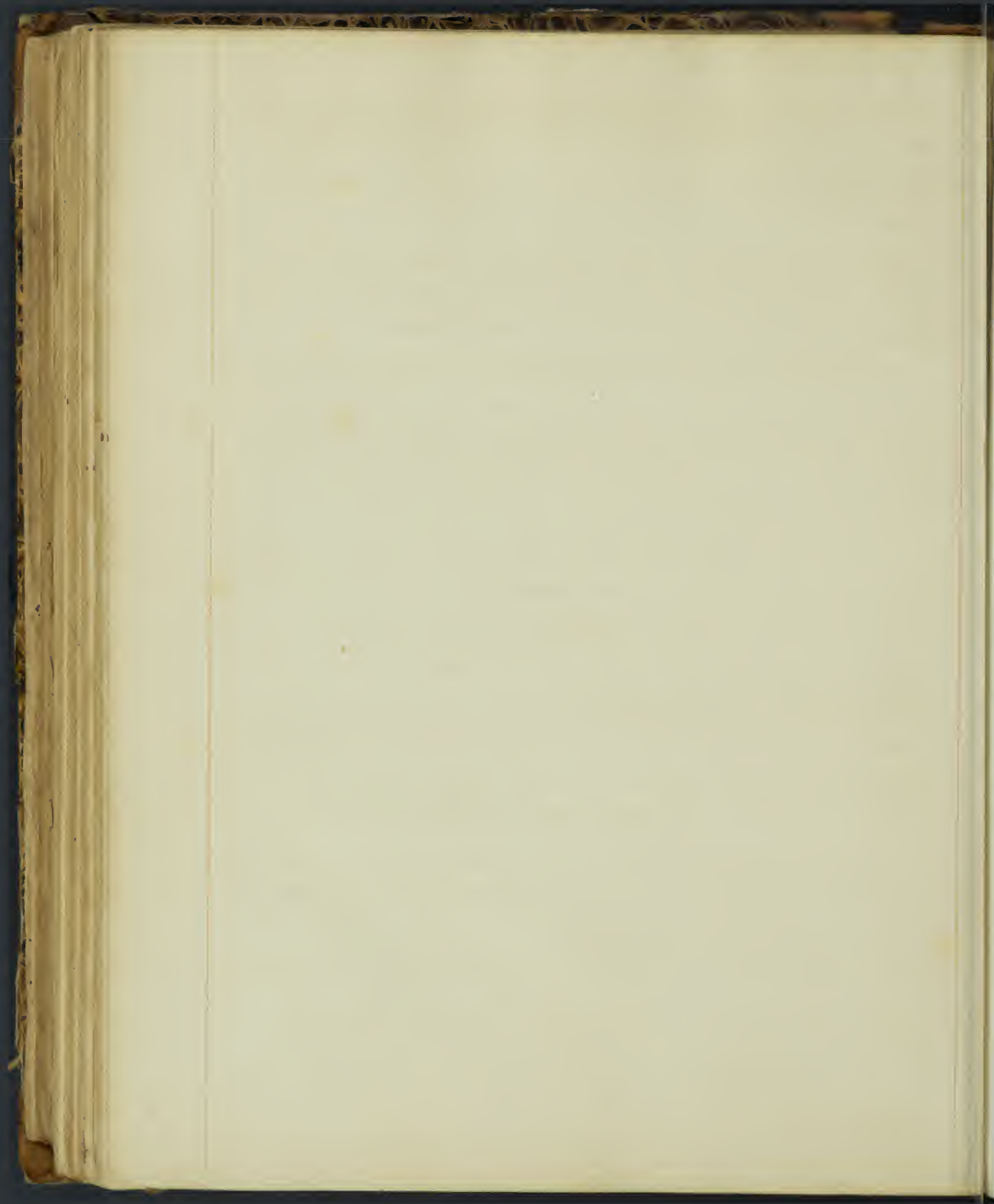
Priority in Law may also be shown from the nature of a Bk. - It has been urged in favor of the rule that acceptor owes the payee nothing: but this is clearly incorrect in point of fact: the acceptor is presumed to have owed the drawer, who has assigned the debt to the payee. - And it is a rule that where ever there is duty, Debt will lie for the enforcement of it. (Com. D. debt. a.)

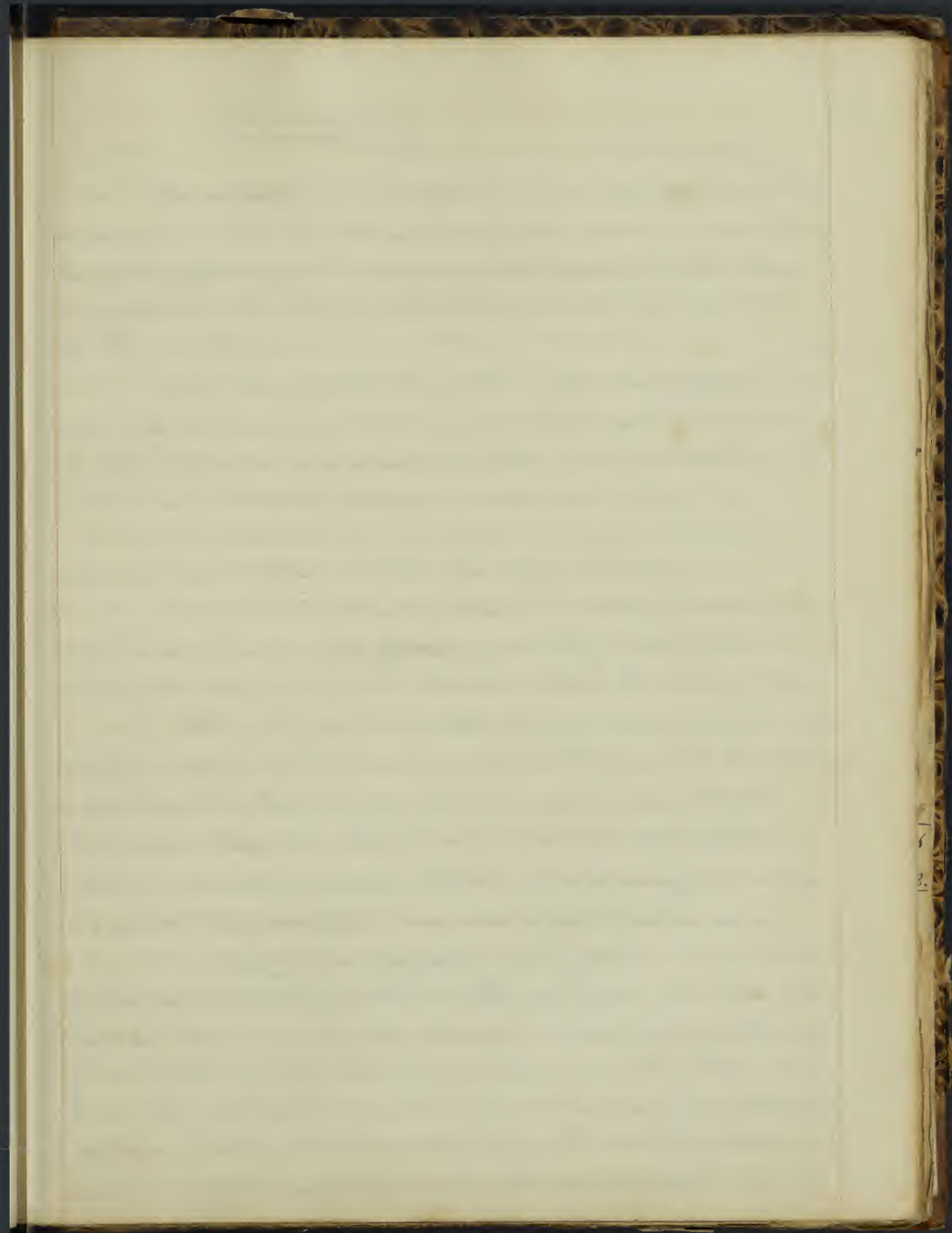
Debt will lie on a promissory note precisely as upon a Bk. (10 Mod 38. Sta 680. Chy 221.)

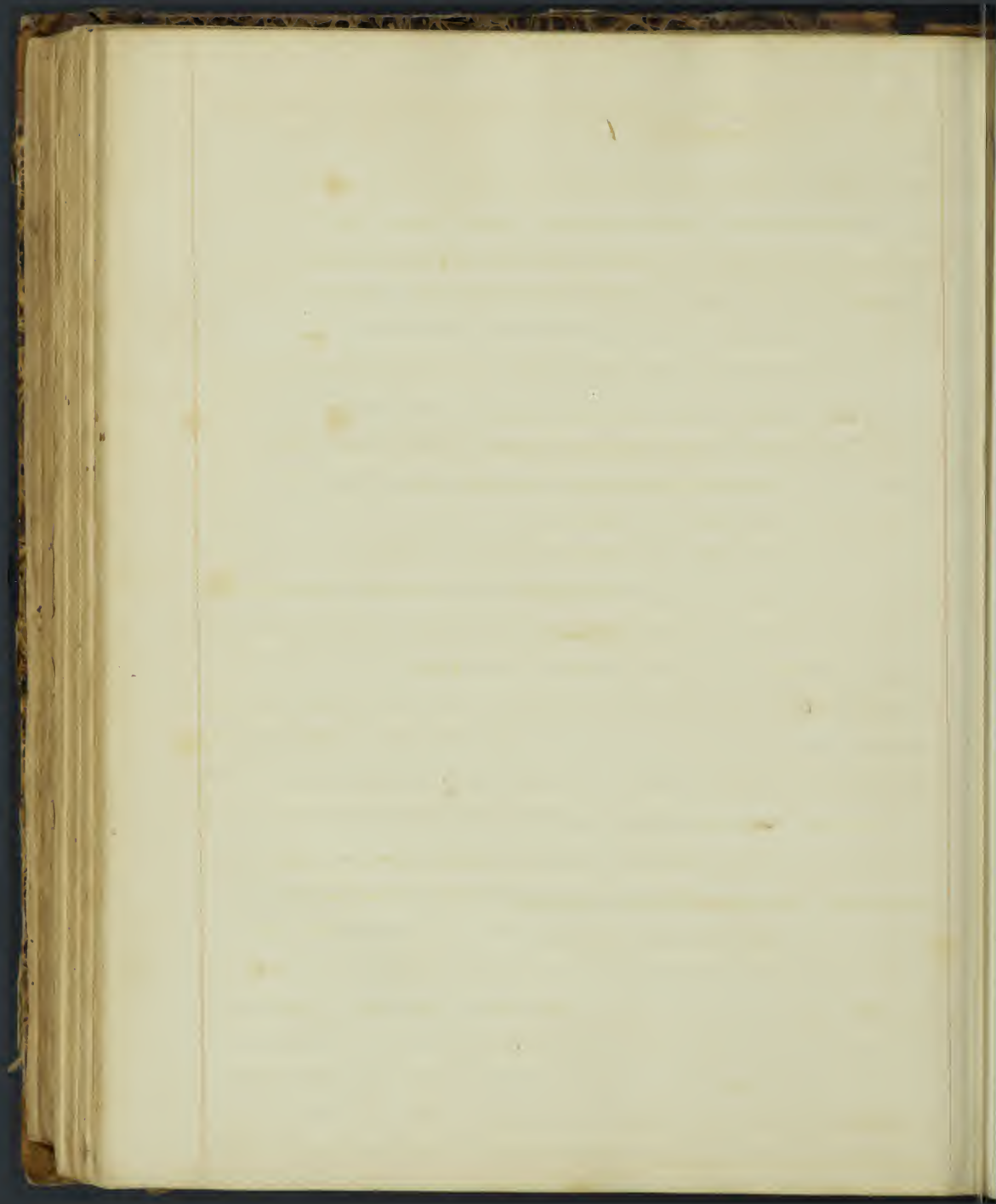
End of Bk.











Partnership. -

Feb. 24.

The contract of partnership is one by wh^{ch} two persons unite their money, goods or labor, for the purpose of profit, upon an agreement that the profit ^(or loss?) or loss shall be divided proportionably between them. -
Doug. 356. 71. 2 Bl Rep 993. 2 H. Bl 247. Watson 17. 4 East 144. 1 H. Bl 37. 4 Esp 183.)

He who agrees to share with another the profits of business, makes himself, as to third persons, liable for the losses: even tho' there shd be an express contract to the contrary. (Corp 814. 1 H. Bl 57. 12 Mod 446. Watson 27. 8. 35. 44. 5. 73.)

And this rule extends to all his private, individual property, personal or real - his liability is unlimited. Bam. 342. Wals. 35.)

And the rule holds as to parties transacting business in diff^t houses, & under diff^t firms, provided they agree to share in the profits & losses of any joint speculation. (Corp 814. Wals. 27. 73.)

It has been questioned whether this stipulation, not to be liable for losses, was binding as between the parties - J. G. says it is - the objection usually made is that of usury - now this may or may not exist - and it is conceived that where the fact cannot be shown the objection will not lie - Besides J. G. thinks that it is rather straining the matter to say that the transaction, in any case, is per se usurious. -

Limited partnerships are frequent on the continent of Europe - allowed & regulated by the civil law - In these partnerships no partner can be subjected to a loss exceeding the amt of his stock. They have been lately authorized in New York - the terms of the partnership must be registered in some office established by law - or published in the newspapers. The utility of these partnerships was fully explained by the Learned Judge. -

Partners are of course joint-tenants of all the stock & effects, as well right as acquired - the moment they execute the contract, each one ceases to be sole proprietor of his stock, & both acquire a right in the whole - but persons holding property as tenants in common or joint tenants are not therefore partners - it will be seen that an express contract of co-partnership & a division of profits ^(loss?) is necessary. -

Tho Partners are joint-tenants & seized per my & per tout, there is no joint accrescendi between them - the Mercantile Law does not recognize that principle (Comb 474. Wats 63. 21. 124. 128.)

Still however, the remedies & liabilities do survive to the surviving partner - rule applies only to effects. -

A person advancing money to others under an agreement to share profits, may make himself a partner without intending or being aware of it. And to determine when such a transaction amounts to a partnership in law we are to be governed by this criterion: - If the agreement is that he is to have a fixed remuneration, not depending upon the amt of profits he is not partner, and the reverse is true of the reverse. (2 Bl. Rep. 947. 98. Wats 27. 31.)

A partnership can be created only by a voluntary ^{express or implied} agreement. -

If two or more persons join their capital for any particular object of trade, or for trade in genl, they become partners. -

There are cases in wh executory agreements for entering into partnerships may be enforced in Chancery - a partner may be allowed no doubt to withdraw when he pleases - but where serious losses not be incurred this will interfere & see 33. Wats 32. 4. 3. 4. 33. 4.

Where there is no express stipulation as to the share of the profits, a proportional share shall be intended. - The genl rule that the profits shall be divided equally is manifestly incorrect - "in proportion to the capital of each" is a necessary qualification. -

To subject a person as a partner, it is suff^t to show that he has agreed to be held out to the public as such. (Doug 371. Corp 793. Wals 40.4. as lending a name on the firm &c. -

When two persons advance their several monies in the purchase of the same cargo &c for the purpose of dividing the property & not for trade - they are not deemed partners. (Doug 371. 1 H Bl 37. Wals 40.5.3.) they do not share the profit & loss &c. -

Further, if A, B. & C agree that A shall purchase in his own name a cargo &c, and that all shall share in the property, each taking a third - they are not constituted partners - the contract to share is called a sub-contract. -

And generally, to subject one as a partner he must be interested in the future disposal & command of the property as well as in the purchase of it. (Watson 45. Doug 371. 1 H Bl 37. Wals 45.) -

And if one person on retiring from the concern, lends money to the other upon interest with an additional annuity, he does not thereby continue a partner (2 Bl rep 998.9) But if the annuity was expressed in the contract to be in lieu of profits, the transaction would amount to a continuance (Watson 44.5.) This nice distinction is grounded on the principle that the annuity is virtually a purchase of the retiring partner's share of the accruing profits. -

When the retiring partner sold his stock to the other for a sum certain, and an annuity expressed to be in lieu of profits, it was held to be a renewal of the partnership, on the principle that the annuity was virtually a purchase of the retiring partner's share of the accruing profits. (2 Bl R 999. Wals 44.5.)

If one of two joint Merchants dies, the partnership remedies survive at Law to the survivor: hence the Ex^r of the deceased partner can join as plff with the survivor to recover debts due to the

partnership concern; for there wd be a legal incongruity in the Pleadings - the survivor wd sue in his own capacity, and the Ex^r and Representative of an other c SalR 444. Esp. dig 118. 2 Ves 242 252. Wals 49. 63. 100. 124. 128.

But the right or interest of the deceased partner is transmitted to his representatives, and the surviving partner is as to the deceased, trustee for the representatives, and must account to them for what he recovers c 2d Ray 341. Wals 294. 5.

Now on the other hand, can Ex^r of deceased partner be joined as debt with survivor by partnership creditor, for the whole liability at Law, survives vs the surviving partner. But if the survivor is compelled to pay all the partnership debt, he may in Eq^y compel the representatives of the deceased to contribute. c SalR 444. Comb 474. 2 Lev 228. Carth. 170. 3 Lev 290. Wals 63.

Besides there wd be an insuperable impediment in the manner of giving judgment - as one wd be charged "de bonis propriis" the other "de bonis testatoris". Still if the creditors cannot obtain satisfaction from the surviving partner, they may subject the Ex^r. of the deceased partner in Eq^y. c 2 Vern 277. 292.

How far & in what manner one partner may bind others by drawing, accepting, or indorsing Bk or promissory notes vide Blk. Ryd. 19. 68. SalR 126.

Here there is a material difference between partners in trade & trading corporations - for no one corporator as such can by his sole act bind the company. The body politic can only be bound by a corporate act c 2d Ray 175. SalR 126. 442. 445. 5. Stod 393. 12 ib 345.

J. G. thinks
this is right
on principle.
-

Indeed individual members of the corporation are not personally bound, nor is their private property liable to their corporate debts (2 T. Rep 672. 3.) As to of partners.

A partnership in trade may be either General or Special. -
It is general when it was formed for the ordinary & genl purposes of trade; and when it extends only to some particular concern or single adventure, it is a special or particular partnership - as where it embraces only a particular voyage (WATS 52. 57. 3. 724. In latter cases however, it respects personal chattels only. (52. 38.)

And the property or effects to wh the partnership extends, becomes the joint property of the partners, from the time when, from the terms of the contract it is to commence. Tho the property of one partner shd not be delivered at the time and at the place of trade, yet it becomes the joint property of both - for the possession of each is the possession of all (WATS 53.)

Partnership concerns are governed by the Law Merch, and the genl Law of Partnership is a branch of that code, & the code itself is incorporated in the Common Law (Co Litt 116 2 Roll 114. WATS 53.)

In partnership concerns Courts of Equity have acquired concurrent Jurisdiction with Cts of Law - their power of compelling a discovery has led to a jurisdiction of all matters of account, and as incidental to cognisance of accounts, they have acquired jurisdiction of partnership wh always embraces matters of account. - (3 Bl 437.)

In ded in Eng^d the Jurisdiction of accounts or matters of account is exercised almost exclusively in Equity. In Coun resorts to Eq^y are not common. -

A debt contracted by one partner in the name of all, will regularly bind all, in what concerns their joint trade. - But if any partner disclaim or protest that he will no longer be considered as a partner, he will not afterwards be liable to third persons trusting the firm with notice of the protest (Salk 292. WATS 59.)

So a debtor of the partnership may safely pay the debt to any one of the firm, and such payment will bind all the partners - for payment to one is payment to all - Again a sale of partnership effects by one is valid as it is deemed a sale by all (12 Mod 647. Wats 612 80. 110.)

The distinction laid down in the Books is that the act of one is the act of all, and binds all if it concern the joint trade: - but if it only concern his private affairs, it binds the partner acting only & not the firm. (1 East 48. Salk 126. 290. Bos & P. 290. Ry & 19. 78. Wats 49. 58. 61. 104. 5. 229. 252. -

This distinction is undoubtedly correct where a partner makes a contract in his own name & for his sole benefit - but the latter part of the rule is too broadly expressed and includes more than is meant.

But suppose that one partner borrows money, buys goods or otherwise contracts a debt on his own sole behalf & for his sole benefit, but ostensibly for the partnership, doubtless the other partners will be bound by his contract, provided the other contracting party did not know that he was acting solely for himself. -

In special partnerships the shares of stock must be joint and there must also be a community of profit, and in case of loss also; for the qualities of a special partnership in this respect are similar to those of a joint partnership (Wats 74.)

But owners of a ship contracting for the carriage of goods or freight for a particular voyage are deemed special partners as to that particular concern - for here is a community of profit and loss. - (2 Vent 196. 2 Roll 248. Palm 399. Wats 74.)

But owners of a ship by the strict principle of the Com Law are joint tenants - but now by the Law Merchant, are tenants in common & this law governs the question. - (Ray 15. 1 Lev 29. 1 Keb 33. 3 Leon 228. Wats 75b. 9.

Hence each partner being possessed "per my et per vobis" any one of them may by C. Law take possession & prevent a voyage projected by the others - and such is the rule at Com Law respecting all jointtenants, for there is no coercive remedy between them (Wats 78.)

But owners of a ship as such are not partners - for a ship in ordinary cases, is not built as stock in trade - tho' if partners build a ship as partners, the partnership doubtless extends to the ship. -

By the maritime Law, the party projecting a voyage or adventure, may by entering into a stipulation in the Ct of Admiralty, prosecute the voyage & the other can't prevent him: this stipulation is in nature of a recognisance entered into by way of security to the dissenting partner or partner. This stipulation can only be entered into in a Ct of Adm^l, it being a proceeding unknown to the ancient Law - (2d Ray 222. 3. 238. Stea 826. 890. 1 Wils 101. Ray 78. 1 Keble 38. 1 Lev 29. Wats 78 to 80. -)

By this security the partners who send the ship to sea, are bound to indemnify the dissenting owner from any loss or damage done to the ship - she being at the sole risk of the parties who adventure (6 Mod 162. 12. 26. 79. Carth 63.)

And an action lies upon the stipulation in the Ct in wh^{ch} it is taken: this at least seems to be clearly the better opinion (Wats 779. 2d Ray 236. 1285. 6 Mod 192. Burr rep. B. 415. Carth 26. Comb 169. Holt 147. 147.

If a partner disapproves of a projected voyage, but does not expressly forbid it, he can't have any remedy vs the other owners tho' the ship is lost during the voyage - for if he does not expressly dissent he is implicitly assents (Carth 26. Wats 79.) and the stipulation is the only mode in wh^{ch} he can express his dissent. -

In this case if the ship returns, the party disapproving the voyage is entitled to an account of the profits of the ship, and also

to a share of the profits or earnings, tho' he contribute nothing to the voyage.

In an action as a wrong doer, for taking away or hunting a ship, part owners may sever. i.e. may each bring his separate action, and recover his proportion of the damages sustained. This is not in accordance with the principle of the C.L. in regard to Joint-Denants, but is agreeable to the Mar. Law. (2 Leon 228. Ray 15. 1 Lev 29. Wats 75. 1 Keb 38.) -

In case of partners in trade each may dispose of any or all of the effects - for each is agent for the whole firm and such sale is within the general scope of the trade (Corp 445)

A ship master is not as such a partner with the owners, tho' a master may be a partner, provided he is part owner. As a master is only an agent for the owners, and in the choice of a master each part owner's vote influences in proportion to his share or shares (Holt 11. Madox 310. 322. Wats 80. 1.) -

Each partner acting for the whole is bound to use the same fidelity and care as a man of common prudence would use in his own individual concerns. i.e. ordinary care & diligence: - for as to the shares of the other partners, the acting partner is in the nature of a Bailee. (Wats 113.)

And if a loss accrue through his omission of that degree of care & fidelity he is answerable to the other parties for the loss.

So also if a loss ensue by his exceeding his authority, he is liable. But not if it happen by a miscalculation or want of judgment (Wats 114. 15.)

The usual right of each partner to sign an instrument for the whole, may be confined by express agreement to one of them. If this agreement is known to those dealing with the comp^y, it will be as obligatory between them as it is between the partners (Wats 115.)

By the strict principles of the com. Law partners are joint^{ly}
See note

-tenants. and possessed "per my & per touk" yet we have seen that they have no jus accrescendi between them; and further, no part of the partnership effects can become the ultimate and exclusive right of either, except his proportion of the residue, after a balance of accounts struck between them. (Corp 468. 469. 471. 2 T. R 478. Exp. d. 96. 7.)

- As A & B. becoming partners advanced equal Shares of Stock, the value of the Stock at the time of dissolution \$20,000. A owes the partnership \$10,000 wh added to the Stock makes \$30,000 of wh B is to receive 15,000 and A 15,000: but as he has already rec^d 10,000 the amt of the debt he owes the firm, he of course takes but 5,000 of the amt of the Stock at the time of the dissolution & B takes the remaining \$15,000: for the creditor partner has a lien upon all the effects, for what is due to him from the other partner. his representatives have also the same lien, and the representatives of the debtor partner are subject to the same lien. -

C1 Ves 242. Wats 124. 28. Ves 252.

Hence if an accⁿ issue is one partner for a private debt, the partnership effects may be taken, but only the undivided int of the debtor's share can be sold - if after balance struck, he is entitled to one half, exclusive of the lien of the other partner, one half may be sold.

But the lien of the other party cannot be disturbed - for it is prior to that of the creditor. -

And the purchaser under the eqⁿ is tenant in common with the other partner. - (SalR 392. Hol 302. Com rep 217. 77. 696.

Doug 650. Corp 445. 3 P. Wms 25. Ld Ray 371. Wats 120. 8. 146. 134.

It is sometimes said that no more can be taken or eqⁿ for a private debt (Wats 121. 2. Holt 643.) than the undivided share of the partner - incorrect - no more can be sold than the undivided share. - and resort must often be had to Equity to determine this share. -

And only part of any one article can be sold - if one should buy a penknife he wd be only tenant in common - I shd cannot sell the entire interest. -

So after the dissolution of a partnership by consent, the legal int of the partners remains the same - they are still joint tenants tho not partners - but the rights & powers are diff - neither is now agent for the other. Corp 645 - 9. Wats 125. 140. -)

The creditor of an indebted partner cannot affect any more of the joint effects than the partner himself might do. - (1 bes 242. 52. 2 Vern 293. Wats 124. 5. 129.)

The rule is the same where one becomes bankrupt - the assignees can take no more than the Bankrupt was entitled to - and resort must gen^l be had to Chancery. -

If ^{one of} the firm becomes bankrupt, the other may dispose of the effects - his power is not abridged. (Corp 465. Wats 140. 8.)

If one partner takes out of the partnership stock more than his own share, he loses all claim whatever to any ultimate Asset -

and his private property becomes liable to his co-partner. -
(144 R 25. Wals 143. 157.)

If one partner has rec^d money due to firm & retains it in his
own hands, the other can't maintain assumpsit for it or for any part of it
until a balance is struck (Corp 449)

2 T. R 478. Esp. di. 96. 7. Wals 157. 321.)

Even after a dissolution one partner can't maintain
Trove vs the other for a portion of the effects - for they still re-
main joint tenants - he must see his time & gain possession when
he can. (Litt see 321. Corp 449. Wals 140. 146. 294. 5)

To a certain extent one partner may be affected by offences
committed by his co-partner - as if an illegal contract is made
by one partner, on partnership acct - even without the privity of
the other, no action can be brought upon it - the Law can't be
violated even to protect an innocent party from loss - the contract
was ab initio void. - (3 T. R 454. Wals 160. Com up 616. Bumb

But if one partner commit an illegal transaction without
the privity of the other on acct of firm, the other can't be punished
~~criminaliter~~ tho' he wd be liable civiliter. And the offending part-
ner wd be liable to the innocent one - upon the same principle
that an agent is liable to his principal. -

An illegal contract is void for the purpose of creating an
obligation a right - but it may in legal effect subject them to the
Bankrupt Laws - (2 Atk 199. Cook. B. L. 67. Wals 194.)

If a cont purporting to be a cont of partnership is in reality a
mere disguise for usury or any unlawful object it is void. -
(Corp 793. 4 T. Rep 353. Wals 195. 201. re "Usury".

As to the settlement of accounts between partners there is a
great deal of nicety in the business. -

on a final settlement each is allowed what he has brought into the common stock & charged with what he has taken out - & the final balance found as one is not all due to the other partner but to the firm - the debtor himself owns a part of his own debt. - Thus A & B put in \$100. A owes the firm \$100 - now he owes B only \$50 because $\frac{1}{2}$ of what he took out belonged to himself. -

The Rule of Limitations does not run as between partners - But after a great lapse of time Equity will not interpose. - WATS 212. 13 Glt. Eq. rep 224.)

The Remedy of Law between partners is by an action of account - the only action that lies between them in a court of Law - But the usual remedy is now by Bill in Ch. in Eng^d on account of the inadequacy of the action of acct - but in this country that action is suff^y & comprehensive & of course there is no necessity of resorting to Eq^y. -

Co. Litt 172. a. 3 Bl 437. 481. 2. WATS 48. 228.

Debt or Assumpsit will not lie because it is impossible to say, ~~therefore~~ the acct is liquidated, what amount either party is entitled to - but after balance struck assumpsit or debt will lie. - (2 J. R 433. WATS 221.)

It is a good rule of Law, that no party can bind himself irrevocably to submit to the decision or award of arbitration - but if there be an agreement that all difficulties shall be settled by arbitration such agreement will operate as a bar to a Bill in Equity, provided the submission confer an authority to examine the parties as well as the witnesses under oath - the arbitrators are then supposed to possess all the means of information necessary to ascertain the merits of the case. - (ARK 450. WATS 277. 8.)

This anomaly to the good rule that all submissions are revocable is founded on the discretionary power of a court of Equity. -

Jointer. If one of the partners borrow money w^h goes to the use of the firm,
vide title this advanced upon the sole bond of one of them, and they become
Pleading. Bankrupt, the lender may come in as creditor under the joint
commission. i.e. vs the firm.

At Law however, the creditor c^d recover vs partner giving
the bond, only. - 1 At R. 225. Wats 229. -

For the rules relating to the jointer of partners as Plffs &
Defts, and the mode of taking advantage of their misjoinder
vide Title Pleadgs. also Watson 229. 1 H. Bl 236. -

Where partners in trade become Bankrupt there are three genl rules
in Equity for apportioning the effects as between the private & common
creditors - this is called Marshalling Assets. -

1. The joint property is to be applied to the payment of the joint debts,
and the separate property to that of the separate debts, in the first
instance - the principle will readily occur to the sagacious reader. -

2^d. If there is a deficiency of property for the joint debts & a surplus of
separate property for the separate debts, the separate property be-
comes liable after the payment of the individual debts, for the debts
of the company. -

3^d & 4th converso, if there is a surplus of partnership property after
payment of joint debts, then so much only of the joint property as be-
longs to each partner is applied to the payment of the separate debts. -

2 Vern 293. 3 Bro. chy 457. 2 ib 119. 12 ed 242. 52. Corp 469. 5 T. R 601.

3 ib 142. 1 Bos. & P. 547. Wats 123. 4. 136. 7. 216. 218. 249.

But if partners becoming Bankrupt are bound via joint
and several bond, the obligee may elect to sue upon either fund - but
he cannot come upon both, unless there is a deficiency in the one which
he elects - he may then resort to the other for the satisfaction of the amt.

(Select R 107. Wats 249.)

It is common on the dissolution of partnership for one partner to take all the effects & pay all debts & account for the residue, yet none of the creditors are bound by this arrangement - they still have their remedy as before. (See 403. 2 Eq. cas 630. 167. 1 P. ms 683. W. & A. 251. 2.)

Such an agreement is binding upon them - if the partner who is to pay the debts, fails to do it, he will be liable to the others. -

Acts subsequent to a purchase of goods may be void that they were purchased for the firm (J. R. 720. W. & A. 259. 271.)

But if at the time of purchase of goods by A, it can be shown that no partnership existed, no subsequent act of B can subject him - i.e. he cannot be made partner by relation to the time of purchase. -

A Partnership may be dissolved or altered by the consent of all even where the contract was for a fixed time which has not expired. -

And where no period is fixed for its duration, any one partner may dissolve the partnership, except under circumstances which would render the act injurious or dishonest. - (W. & A. 273. 4.)

Where a period is fixed for the duration no partner can withdraw at pleasure, even tho' no emergency should require his continuance: - it is therefore advisable not to have any positive stipulation as to time. -

In these rules much discretion is to be exercised by a Court of Equity. -

A partnership however may be dissolved in either of several ways beside that of mutual consent - as in case of fluxion of time fixed by the contract, it here terminates itself - or 2^{dly} by a division of all the joint effects and holding them severally (W. & A. 275.) after liquidation 3^{dly} a partnership special, is dissolved by the completion of the adventure. - 4th by an award of arbitrators, provided the submission delegate to the arbitrators authority to dissolve (W. & A. 276.) 5th by Bankruptcy of the firm or of either of the parties - for his property is all assigned to the assignees, under the commission, both separate & joint. - Corp 448. 471. W. & A. 282. 5

This commission of Bankruptcy has the effect of an execution from a court of Justice - the assignees take the property as the Off. m^r. (Bank 153)
6.th Death of one of the partners, whether the firm consist of two or more makes no difference - the origl contract is annulled unless there is a special stipulation in the agreement. - (Wals 294) the contract does not imply than any number less than the whole will enter into partnership. - A temporary mental derangement of one partner does not work a dissolution (Wals 295. 6.)

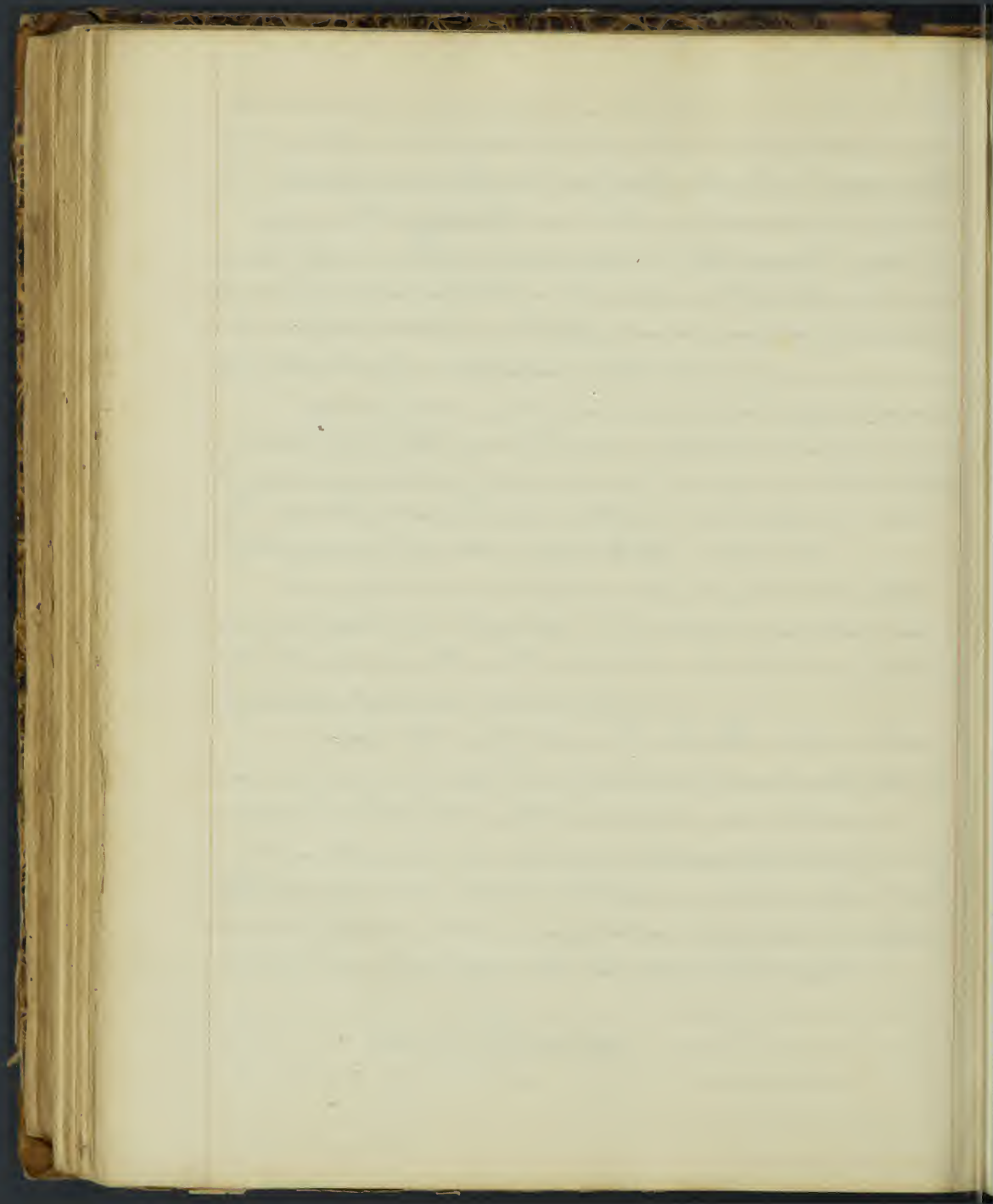
If one of several partners dies, his ex^r or adm^r does not become a partner - but if there is an express agreement to that effect it will be binding - the partnership continues of course - no need of new agreement (2 Bos 33. Wals 295. 7.)
7.th by Attainder of Treason or Felony: - not recognised in these states - principle of Com Law is Civil Death. - (Wals 293.)

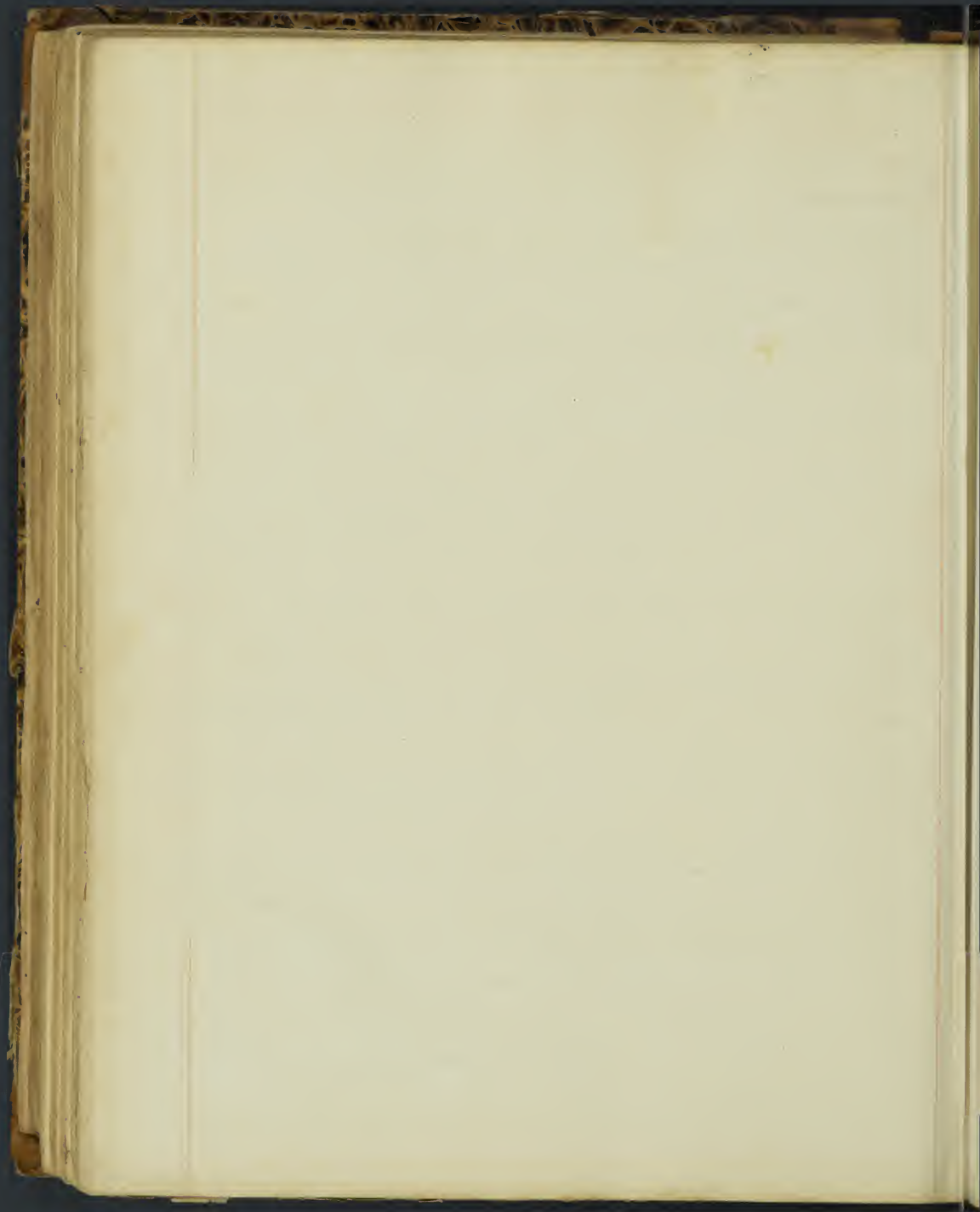
In an agricultural partnership, as in the case of two tenants or lessees, the death of one is not a dissolution - because the representations of each lessee are bound by the c^o in the lease, it is said the engagements devolve upon the deceased's representatives. -

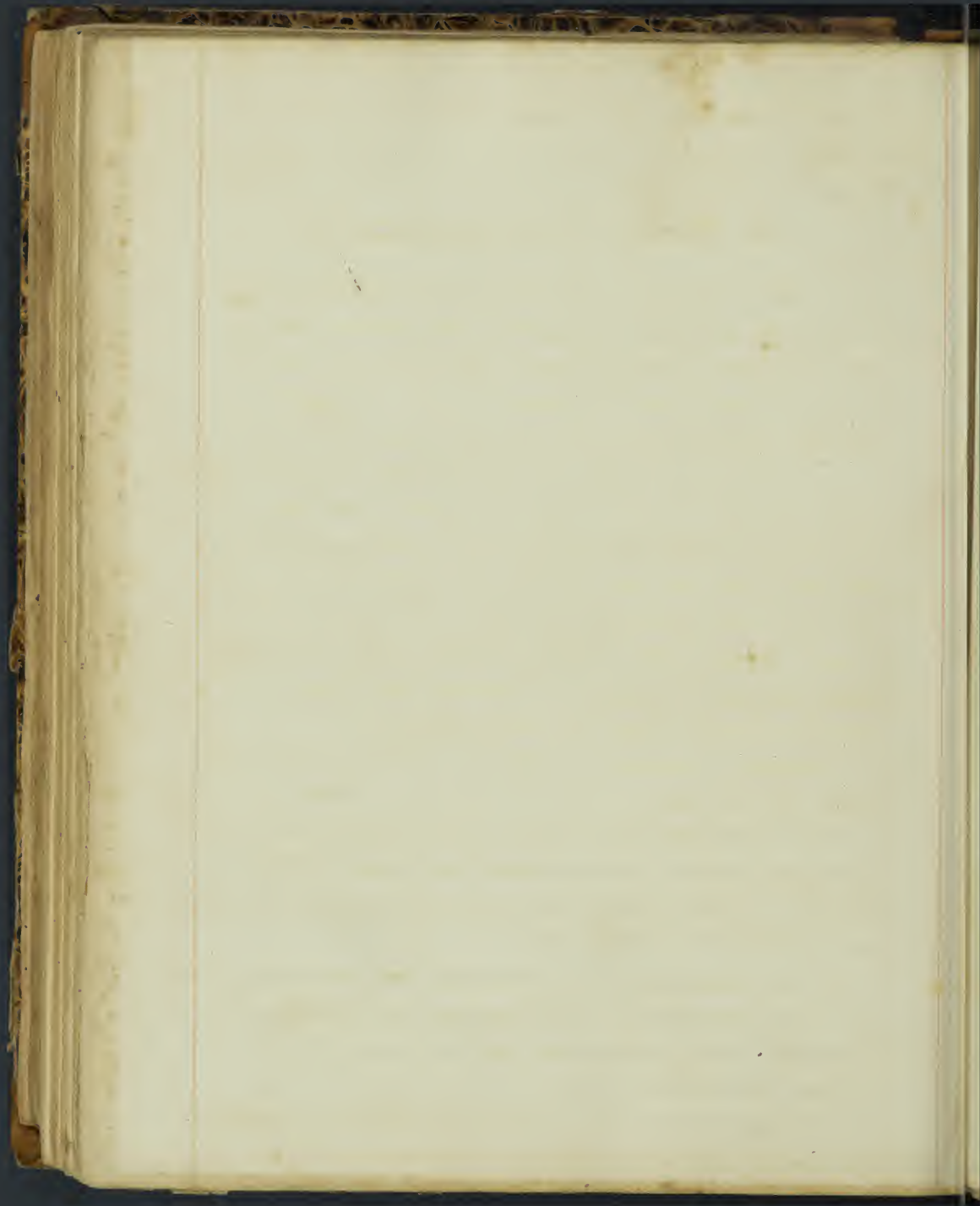
If after the death of one partner the other continues the trade and receives the profits, he is compellable to account with the ex^r or adm^r (1 P. Wms 141. 10 Mees 20. 2 Eq. cas 5. 733. Wals 301.)

Where both partners die before a final adjustment of accounts, a Ch^{of} Eq^l on a bill for an account, will appoint a receiver, who is to hold the property till the accounts are adjusted, and to distribute the effect (2 Bos Ch 272. Wals 303.) as the the Court shall direct. -

End of Partnership







Of the writ of Mandamus.

This is a prerogative writ issuing in Eng^d from B.R. and answers in some degree, in its effects, to the specific relief afforded by chancery. - It is not thought to recover damages - 3 Bl 110. Salk 429. 1 Vern 175 - but to compel the party to do what by law he ought. It may issue from chancery (sembl.) 1 Vern 175. But this right is now exercised by B.R. only.

It is granted in those cases only that relate to Government or the public, and where without it, there would be a failure of justice. In the U. S. it must be issued by the highest court of ordinary jurisdiction - a mere court of error can never issue it. Its object is to enforce obedience to acts of the Legislature (in Eng^d) to the King's charter, and to prevent disorders from a failure of justice (3 Burr 1267.) and a defeat of justice. It issues only in those cases where there is no other specific remedy. - (Doug 506. 4 Mod 285.) -

Generally it is not granted when there is any adequate remedy by action, whether specific or not (1 T. Rep 148. Corp 377.) - In Conn. by Sup. Court.

The object of the writ is to restore a person to some corporate or other franchise or right which concerns the public, or administration of justice, and of which he is deprived - or to admit a person to some right &c. Esp D. 661. 11 Co. 93. 3 Bac 529. -

The writ issues vs some public officer, body corporate, or inferior court, commanding a performance of some official or corporate duty, which the public officer, body corporate &c has refused. - (3 Bac 528. 4 Mod 52.) -

It does not lie vs a private individual to compel him to render justice to another: this end may be obtained elsewhere. -

It is demandable of right and the court of B.R. is bound to grant it without imposing terms (3 Bac 528.)

It issues to compel officers of corporations to call meetings to hold elections &c, when by law it is their duty, & they neglect their duty. - This not be a disorder arising from defect of police (1 Lev 96. Ray 69. Esp. D. ⁶⁶²)

So to restore a person to any description of office corporate, if whole is unlawfully deprived of - Esp. D. 441. Ray 431. 1 Sid 14. &c. If constables &c shd be illegally deprived of their offices (Poph 176. 4 Burr 1279 Vent 77.) So to command persons in authority to do their duty. (Sta 13. 19.) &c to a Judge of an inferior court to proceed to judgment (2 Kebb 879. 3 Bac 495.) To ecclesiastical courts &c to grant probate of a will, or administration to whom it belongs (Sta 552. Litt 457. Salk 299.)

It lies to a clerk of a corporation requiring him to deliver up books &c to his successor on being removed from office and refusing to deliver them. Esp. D. 662. 7. 2 Sta 879. 1 Will 285.)

It is not fixed by any definite genl rule what offices concern the public, or admin. of justice and to wh one may claim to be restored or admitted by the suit - the matter has been much extended in modern times - decided that the mayor, aldermen, common council, town clerk, constable, sexton, parish clerk and some others are entitled to it (3 Bac 529. 11 Co 94. 2 Bulst 122. May 78. Vent 143. 53. Ray 221. 2 Sid 112. (Roll 595. Salk 175. Corp 371. 7.)

So it lies to restore one to the place of an attorney to an inferior court - An atty is as much an inferior officer of the court as a Sheriff (3 Bac 530. 1 Lev 75. 1 Kebb 589. Vent 111.)

The office in these cases must be of a certain permanent nature - Esp. D. 665. 1 Will 11. & therefore an officer under an institution &c depending on a voluntary subscription, not endowed, is not entitled to it. - ex. gr. Private library, Fireman Society &c. 1 T.R. 331. 4. 125.)

These mere voluntary associations are no more regarded in law

than private firms or companies of merchants - But the office need not be a free hold, it is sufft that it is an annual office, with the fee annexed. (Exp D. 66. 1 T. R. 146.) - The last rule extends this rule to all public offices. - But where the office is merely of a private nature it will not be granted. (Exp. in Engd. Demand of a Court room. Exp D. 66. (1 Sid 40. (Vent 143.)) -

In Court, offices of private companies, a library comp^y &c. will fall under the description of private offices - also turnpike comp^y - the grant of incorporation being made analogous to the King's charter of public the writ will probably lie for those officers - so probably for the officers of a Bank (3 Bac 528. n.)

The writ never goes to enforce an act of a constable &c. when it is uncertain whether he has a right by law to do it. (Exp D. 665. 1 Wils 266.)

Nor when there is another specific legal remedy (Exp D. 46. Doug 576) ex. not to a Bank to compel & to transfer of stock - for case lies to redress the wrong - this will be nothing more than enforcing a private right. -

It never is granted to compel a constable or magistrate &c. to do an act where the doing of it is discretionary, as to adjourn or continue a case or grant a new trial. - (2 Bl Rep 708. Exp D. 668. 2 Ke 885.)

If several are deprived of franchise, office &c. each must have a separate mandamus - they cannot join - for a wrong is distinct, and the cases may be diff^t (Bull 200. Exp D. 66. Tack 433.) If then a city has not a whole body of Aldermen, each must have a distinct writ. -

As to the mode of granting the writ,

It is not usually granted in the first instance, tho' it sometimes is; the usual mode is by a rule to show cause. - (Exp D. 667.) and this is not granted but on affidavit of the party applying. -

If upon rule granted, no cause is shown why it sh^d not issue, it is issued (3 Bac 528. Bull 199. 3 Bl. 111) But under pressing circumstances it will issue in the first instance or not at all (Exp. D. 649.) ex. ge. to sign a poor rate in Engd when overseers refuse. 3 Bl. Com 111.) -

It is never granted till there has been a default - never to prevent one in the first instance (Esp. D. 670. Bull 199.)

The writ is directed to the person whose duty it is to perform the act commanded (Esp. D. 672. SalR 486.) It is to go to him, and he is at his peril to do the act required by complainant or return sufft reason for not doing it. -

Wherean act ought to be done by a part of the corporation, it may be directed to the whole corporation, or to the part wh is to do the act, but not for any other part (Esp. D. 678. SalR 499. Ra 55-)

When sufft cause ~~is~~ issuing, the writ is not shown, the writ itself issues in the alternative, to do the act, or shew sufft cause for not doing it (3 T. Rep 111.)

If Deft returns a true & sufft reason, he is excused and at Com Law the return of the officer is not to be doubted; but case lay for a false return (Doug 134. Esp. D. 648. Vent 111. SalR 32.)

Now by Stat of Anne, it may be pleaded to a traverse (3 Bull 573. Esp. D. 648) and if the complainant ~~complain~~ prevail either by verdict or otherwise in the plea, pft receives damages & costs: but if the writ of mandamus recover this for him, he is barred of his action for false return (Stat of Anne c. 20.) -

Since the stat, if the return be false with a question for delay) the party issuing has a peremptory mandamus, i.e. a peremptory order to do the act required (3 Bl R. 111. Esp. D. 648.)

So if the return is insufft upon the face of it, a peremptory mandamus issues both at Com Law and under the stat (3 Bl. 111. Esp. D. 685. Bull 205.)

Before the Stat of Anne, the only remedy for a false return was an action on the case, i.e. the return could not be falsified in the proceedings on the mandamus (11 Co. 7. Esp. D. 648. 3 Bl 111.)

But if the false return was made by scil the action might be

is all or any, it being a tort (3 Bac 584. Carth 172.)

And the action lies for the "suppression veri" as well as for the "suggestio falsi" (Doug 1146.) But if one of the seal persons had used or the false return & overruled, no remedy can be had or him (Esp D. 187. 2d Ray 546. Carth 172.)

If the return be justified in the action on the case, a peremptory mandamus issues, of course - provided the action is in the same court from wh. the mandamus first issued: for the falsity of the return then appears from the record of that court (Esp D. 686. 3 Bac 544.

SalR 420. -

If the writ is in a different court, the truth of the return must be tried by an issue joined for that purpose after the recovery in the action - But the record in the action is conclusive (S. G.) when that issue was brought (SalR 428. Esp D. 86. -

If after a peremptory rule to return the writ, no return is made, an attachment issues for contempt (3 Bac 457. 2. SalR 429. 24. 3 BLR 111.)

And if the writ was issued or seal, the attachment must be or all tho some not have made a return (Ha 208. Esp D. 184.) here however those who obeyed the rule, not be punished under the attachment.

Contempt is punishable by fine and imprisonment, or both sometimes. (1 Bl. 387. Ro. Car 146.) and in some cases with infamous punishment or whipping, or spitting?

If the party to whom the writ is directed, fails in respect to the Court, in his return, he is punishable for contempt by attachment

3 BLR 111

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of the writ of Prohibition.

This is a prerogative writ, issuing from the Ct. of B.R. to prevent inferior courts from deciding cases out of their jurisdiction (4 Com 489. Fitz. N. B. 39. 12 Co. 6. 2 Y. 3 Bl. C. 112. 4 Bac Abr.) and to prevent them from deviating in the mode of their proceedings from any regulations prescribed by Stat. - 2 H. Bl 100.) -

It may also in some cases issue out of Chancery, Com. Pleas, & Exchequer (1 H. Bl 476.) The jurisdiction of B.R. as to this writ vide 3^d Bl 112. 1 P. Wms 476. Holt 15. 4 Bac 241. 12 Co 58. 4 Com 489.) seems now universal. -

It is directed to the inferior courts and the party prosecuting it, and is founded on a suggestion that the cause itself, or some collateral question arising in it, is out of the inferior court's jurisdiction, or that the court is deviating (as *supra*) 4 Bl 112.) in some respect from the stat regulations. -

The mode of obtaining a prohibition, is by a rule to show cause why &c the writ should issue - and in many instances, affidavits must be made, that the crime or question &c is out of the jurisdiction of the inferior court (4 Bac 244. 1 P. Wms 476. Talb 529. Rob 593. -

Also when the fact appears from the face of the declaration, libel &c of the inferior court c. d. (Ray 1211.) -

The Court above must grant the rule without some proof of the fact on which it is founded - Whether the granting of Prohibition is ex debito iustitiae, or discretionary - the authorities are contradictory - the better opinion is that it is discretionary (1 Bos & P. Talb 83. 2 Bos & P. 220. 570. 586. Ray 392. 4 Bac 242, Not 67)

It lies in some instances when the inferior court has jurisdiction of the cause, &c. when a stat has been passed, regulating the proceedings in such case, and the inferior court deviates from that regulation. This case & the case of want of jurisdiction are said to be the only cases in which a prohibition can issue (3 H. Bl 100.) -

For the purpose of obtaining the writ, the party aggrieved in the court below, sets forth upon record a "suggestion", containing the nature

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and cause of his complaint, upon wh a rule is granted to show cause (3 Bl 113)

If the matter suggested is sufft in support of the rule, the writ issues - Alia if insufft - The writ commands the cust^{or} to hold the plea, and the party not to prosecute further (3 Bl 113.)

But if the sufficiency of the cause suggested is doubted, it presents a question of difficulty, the party complaining is directed to declare in prohibition i.e. to prosecute an action by filing a declⁿ vs the opposite party (3 Bl 113 & Bac 248. Co El 736.) - upon a fiction not to be availed, that the latter has prosecuted in disobedience to a prohibition before granted (1 Ler 125. 4 Moor 151. Cro El. 736. 4 Bac 248. Fitch St. B. 442.)

This is done for the purpose of having the question more deliberately & solemnly considered than on motion, in wh the proceedings are summary.

The declⁿ must follow the suggestion - the action is regularly proceeded with, and the question of the sufficiency of the cause suggested, tried upon the pleadgs in the action (3 Bl 113. 4 Bac 248. n.)

If the cause suggested is adjudged sufft, judgment with nominal damages is given for Plff and a prohibition issues vs the Dft and the inferior court, commanding them to proceed no further. If insufft, judgment is for Dft and a writ of consultation arranges, i.e. a writ is issued upon deliberations or consultations had, committing the cause to the inferior court to be determined, notwithstanding the former fictitious prohibition. - 3 Bl 114.)

So too a writ of consultation is sometimes granted, when there has actually been no prohibition, ex. the party prohibited may file a declⁿ (pursuing the suggestion) and traverse the fact on wh the prohibition was founded, & if the issue be found for him, a consultⁿ is arranged (3 Bl 114.) - The effect of this proceeding is in this case, to rescind the former actual prohibition. -

The Court itself also, gives more motion, ~~may not~~ ^{may} ~~not~~ any action sometimes arranges a consultation after prohibition issued (3 Bl 114. 4 Com 57) ex gr. When upon further considⁿ it considers the suggestion insufft.

Disobedience to this writ is a contempt punishable by fine and imprisonment at the discretion of the court (4 Bac 262. Fitzh St. B. 40. 279. 4 Bl 297.)

And it is also a contempt to commence a new suit in the same inferior court for the same cause after a prohibition (4 Bac 262. Mod 593. 1 Leon 111.) -

On the attachment for contempt, p^lff recovers damages and costs for the stay proceeding after prohibition, and a fine or other punishment is also inflicted for the public offence (4 Bac 248. n. 262. Co Cas 537. Vent 348. 3 Lev 216) vide Const Stat 5581.

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of the Writ of Habeas Corpus.

by which
This is a writ ~~the~~ ^{by which} a person restrained of his liberty may be brought before some supreme court for some special purpose; as on his own application to be relieved from confinement, or to attain justice, or upon that of another person having a right to require his appearance (3 Bl 129. 131.)

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Of this writ the kinds are various, 1. Ad Respondendum. -

This lies where one has cause of action vs another confined by process of an inferior court to remove the prisoner so as to charge him with a new action in the court above (3 Bl 129. 3^d Mac 2. Dyer 197. 249. 2 Moor 198.) -

II. Ad Satisfaciendum. This lies when a judgment has gone vs prisoner & plaintiff wishes to bring him up to serve him with process of Execⁿ (3 Bl 129) Not necessary in Comm. Execution is served upon him in prison. -

III. Ad faciendum & recipiendum. - Wh lies where a person confined by process of an inferior court, wishes to remove the action to a superiour court to be decided. Here his body is removed by Habeas corpus, frequently called "Habeas Corpus cum causa" because the suit is removed with his body (3 Bl 130. 3 Mac 2. 15. 1 Mod 235. 2 id 198.) this kind of "habeas corpus" is demandable of common right and without any motion, and instantly supersees all proceedings in the court below (3 Bl 190. 2 Mod 336.) and any subsequent proceedings are void as "ex parte non iudice". (3 Mac 15. Salt R 352. 12 Moor 666.) [†] In this case his body is removed by writ of habeas corpus, and the proceedings & records removed by "Certiorari." -

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It is not granted (tho matter of right) when it wd abate a rightful suit or rather a "pro extendo" wd be awarded in such cases. 24. Some sole being sued in an inferior court, moves & wd then remove it - for if proceeded with in a higher court, the suit wd abate for the non liquet of the Justices (3 Mac 15. Salt R.) Not in use in Comm. appeal is used. -

IV. Ad Testificandum. When a person or party wishes to

produce a prisoner as a witness. (Cont 1748. 3 Bac 3. 3^d Hilt 51. (C. 13.)

It was formerly holden that this wrought an escape of the prisoner in ex^{te} (3 Co 44. 2 Bac 238.) Ad 20 J. G. -

But if Sheriff or Gaoler in any case gives prisoner unnecessary liberty, as to go at large, or go with him in any circuitous way, it is an escape (Cao. Car 14. Hot 202. 3 Co 44. Moor 116. 2 Bac 238.) -

It is never granted to bring up a prisoner of war (Doug 403) Nor such prisoner, Courts of Com Law have no jurisdiction; for such purposes they are subject only to the executive. -

V. Ad Subjiciendum. - Wh is the principal writ of "Habeas Corpus" and as to the person holding another in custody, and commanding him to produce &c, and to do, submit to, and receive whatever the court or Judge shall award (3 Bl 131.) This is a Com Law writ in favor of the liberty of the Subject. - (1 Burr 634.)

This is the great writ by wh release from any species of confinement, wh is illegal, is obtained. - (3 Bl 131. Rost 92.) Stats 16. & 21. Car II wh give the full benefit of it to the Subject, and is regarded in Eng^d as a second magna charta.

A person imprisoned by either house of Parliament for a contempt, cannot be discharged by this process (3 G R 344) Such an interference wd^d be an invasion of the privilege of the Legislature. The rule is the same in this country as to our Legislature; - every Legislature has a right exclusively to Judge of contempt committed vs itself - So have Courts of Justice. -

It issues at Com Law from D. R & Ch^l (by a fiction of privilege, as being a Suitor) from Com. Pleas & Exchequer (2 Bac 3. 10 Moor 198. Co Lac 549. 4 Bac 356. 2 Vent 24. 3 Bl 131. 2 Hob 144.) -

But in case of commitment for a crime, these two Courts wd^d at Com Law only take bail for appearance in D. R, or remand (3 Bl 132) They having no crime jurisdiction cannot discharge -

But now since the Stat 16 Car II c. 10. the full benefit of

this writ may be had (without any fiction being) in either of these Courts (3 Bl 134)
Whether it may issue from Ch. in vacation, See 2 Bac. 5. Hale p. c. 147. no.
As to Court rule vide 1 Stat. Ann. 69. 2. d. 186.) -

It is directed to the Gaoler or other person detaining to produce the body
of the prisoner, with the cause of his detention (3 Bl 134. Salp 250. 2d Ray 576.
618.) and the Court as the case requires will discharge, admit to Bail or re-
mand (5 Moor 22. 1 Vent 530. 346. 3 Bl 134.) -

The great object of this writ is to afford specific relief to all persons
who are restrained of their personal liberty without lawful cause. -

The Com Law having been enacted by the Judges, a Stat was
passed (31. Car 2d) wh now in a great measure regulates this writ (2 Bl 135.
3 Bac. 7.) Since the Stat any one of the 12 Judges may issue it during va-
cation (10 Jac 23. 3 Bl 134. 6.) It lies for persons committed by the King
or his Council, as Sec 9 of Stat 16. &c. (3 Bl 135. 6.)

By the Const. of U. S. privilege of the writ of Habeas Corpus cannot
be suspended, except in time of rebellion or invasion - The public Safety
requires it, & it must then be done by Congress. -

It lies not for persons committed on execu or conviction, and by
Stat Car II, it is denied under certain circumstances & restrictions, in such
cases as commitment for Treason, Felony &c. (3 Bl 136. 3 Bac 7. Moor 429.)
^{See 143 -}

It lies for children, wards, or Wives unreasonably confined by
parents &c c 2 Holt 52. Sta 982. 3 Bac 10. 2 Lev 128.)

And the writ may be sued out by a friend of the person confined. -
Sta 982. Burr 606. 5 Moor 21. 3 Burr 1362.) -

Disobedience to the writ is punished as contempt (3 Bac 10
Fitzh N. B. 67, 12 Moor 666. 3 Bac 10.)

Thus, the end. -

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Quo. Warranto. -

This writ lies vs any one who usurps an office or franchise or exercises the one or the other, after he has forfeited it. - The object of it is to remove him from office (3 Bl 262. vide Bull N.P. 206.)

This writ is in some measure a counterpart of the writ of Mandamus - the object of that writ is to restore. -

The proceeding in modern times, is not by a writ a civil process, but by information. -

The old writ of quo warranto, is now nearly out of use, wh was a civil process - the proceeding is now of a criminal nature. -

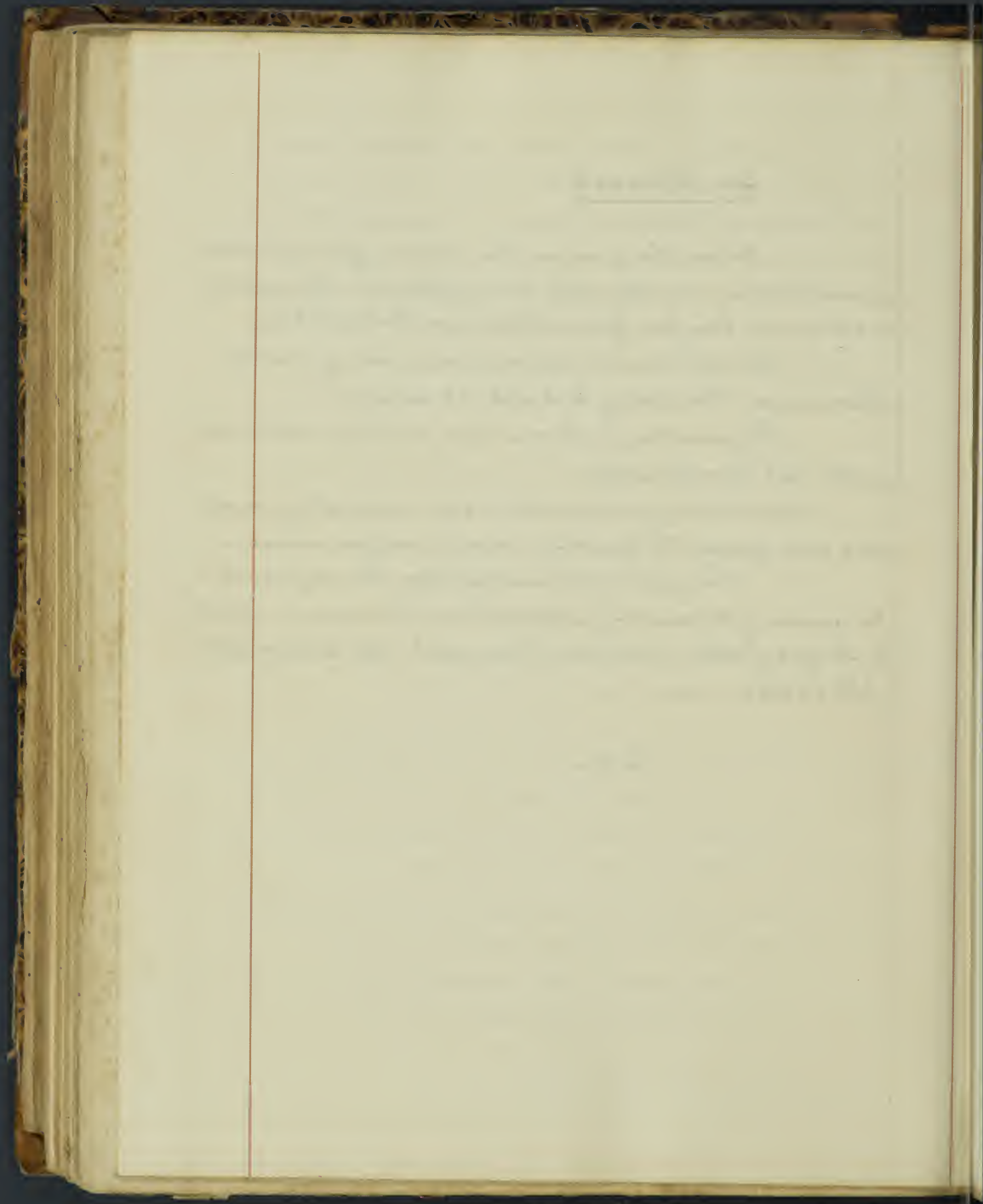
The effect of the proceeding when the writ prevails, is the removal of the usurping incumbent; and his removal is effected by judgment of ouster (Bac Abr. Tit Quo Warr.; Com Di. A. a. 2.º We 3 Bl 262 &c. -

End. -

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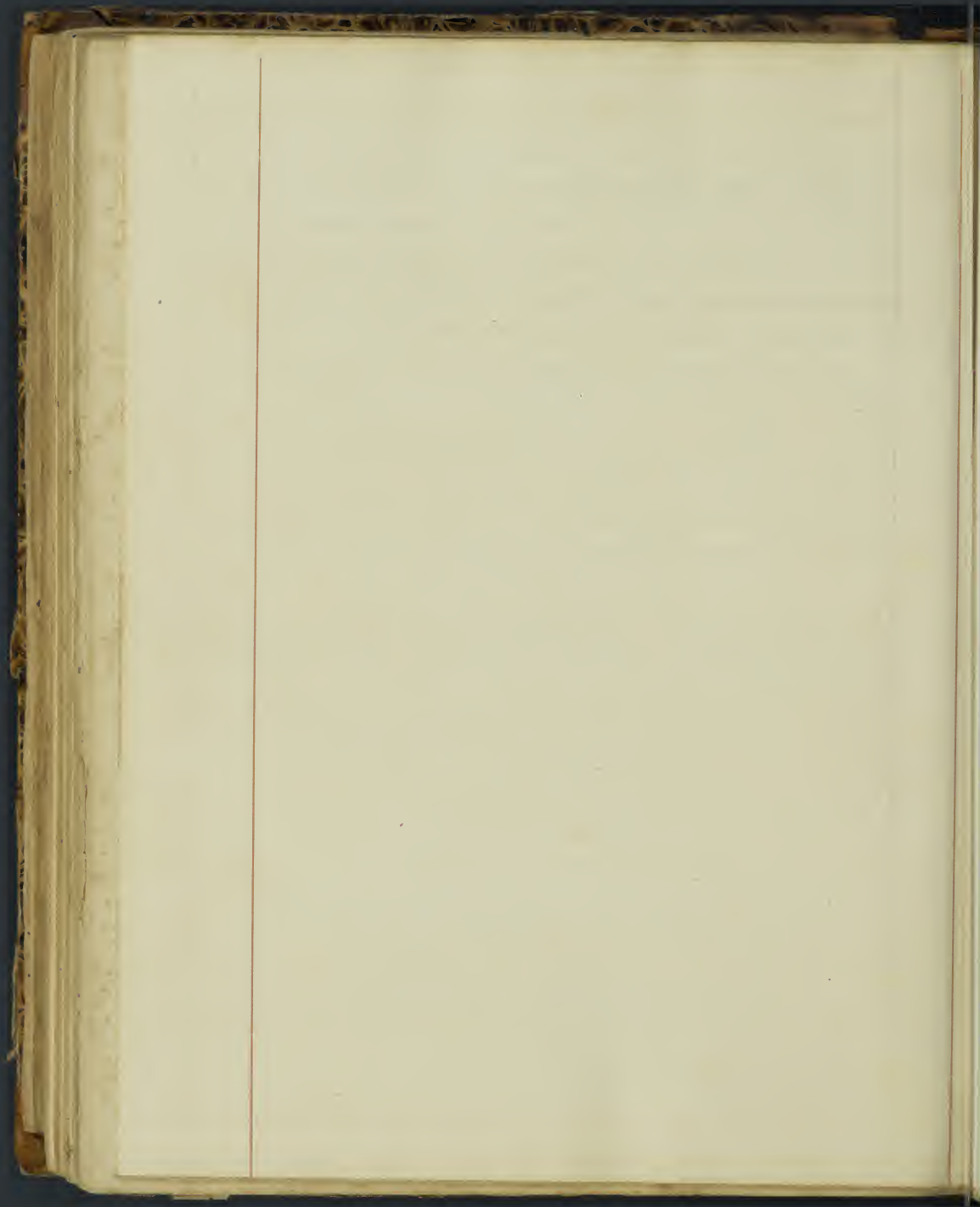


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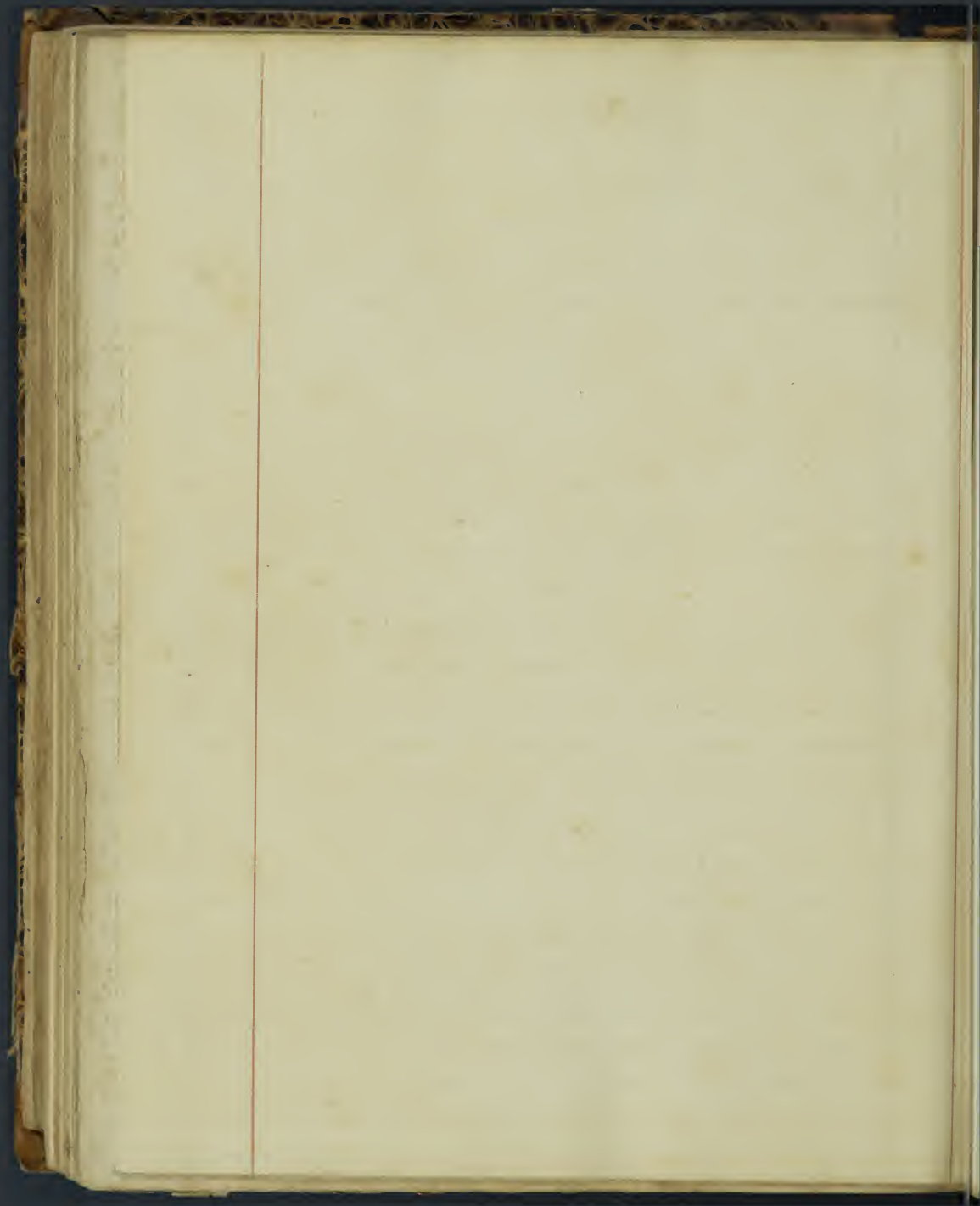


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Bailment.

A Bailment is a delivery of goods on a contract express or implied that they shall be restored to the bailor, or disposed of according to his direction, when the purpose for which they were delivered shall have been answered. (Jones 3. 43. 2 Bl. 451. 12 Mod. 432. Cro. El. 622.)

Every bailment vests a qualified property in the bailee: Yelv. 172. Jones 112. Doct. & St. 129. 1 Bac. 240. 1.) It is said by Lord Coke that a pawnee is distinguished from all other bailees, because he has a property or interest in the goods bailed; but in this respect there is no distinction between pawnee and any other bailee: every bailee has a lawful possession & a right of possession & a right which the law will protect: the bailee is the owner against all the world except the bailor. (4. Co. 33. b. Co. Litt 34. a. Jones 112. Yelv. 172. Doct. & St. 129. 7 T.R. 392. 7. 9. Sta. 555.) The interest of pawnee, however, from the nature of the contract, would seem to be rather higher than that of a common bailee.

The bailee is not liable for any loss which the goods may sustain without any fault on his part. To determine when he is in fault the nature of the bailment & the quality of the property bailed as well as the conduct of the bailee are to be considered; and the principal object of enquiry is to ascertain the requisite care and diligence which in each case, the bailee ought to exercise. 1 Bac. 236 Jones 8.

The Bailee under a general acceptance, is to keep or use the goods with a degree of care, proportioned to the nature of the bailment. In some cases the diligence required of a bailee is greater than ordinary care; ^{as in some cases} the acceptance is general where the bailee enters into no

special agreement as to the care which he will use: where he does agree concerning the care, the special agreement determines the degree which is to be used, and the law is silent.

Ordinary diligence is that which every prudent man uses in the care of his own goods, or in the management of his own concerns. But the degrees of diligence on either side of this standard, have no technical name: In the civil law, the latin language has appropriate terms for each degree. Levis, levissima, & lata culpa.

To each degree of care, there is a corresponding degree of neglect: hence the omission of ordinary care, is ordinary neglect; the omission of that care which very diligent & vigilant persons use, is called less than ordinary neglect: & the omission of that care which inattentive persons take, is more than ordinary neglect. (Jones 13.30.1.) This last degree is usually called gross neglect, and is prima facie evidence of fraud in the bailor. (Ld. Raym. 915. Jones 13.55.64.)

To illustrate the general rule "that the law requires a diligence ^{nature of the bailment} proportioned to the benefit received": If the bailment is for the benefit of the bailor only, under a genl acceptance, nothing more than good faith is required of the bailor: he is not liable even for gross neglect where the circumstances exclude the presumption of fraud. ("Qui sentit commodum, sentire debet onus")

(1 Par. con. 247. Ld. Ray. 915. Jones 15.16.21.2. 57.5. 64.5. 107.2.) In 4 Co. 23(b) Ld Coke says that the bailor in this case must keep the goods at his peril: not law. In this case, tho the decision is clearly right, the arguments laid down in support of it are entirely wrong & would not be received as law at the present day.

When the bailor is the only person benefitted by the bailment he is liable for slight neglect. Jones 15. 23.33. 39. 90.4.

Where the bailment is reciprocally beneficial to each, both parties partake of the risk, and the bailee is bound to use ordinary care merely: he is liable only for ordinary or gross neglect. (Jones. 14. 22. 32. 3. 107. 5.) These rules govern where there is no special agreement.

Bailments according to the books of English Law are divided into six kinds. Sir Wm. Jones. has five.

The first kind is called Depositum: in English Deposit: it is a delivery of goods to be kept by the bailee for the sole benefit of the bailor: bailee is called a depositary: sometimes called a naked Bailment.

The second kind is called Commodatum a lending: it is a gratuitous loan of goods that can be used, & the bailee is the only one benefitted: bailee to restore them specifically. ~~Loans~~ lending & borrowing is the proper English term. Id. Ray 915. 89.

There is a distinction between this sort of bailment and a Mutuum. which is a ^{not for use but consumption} loan and generally gratuitous: but it is to be restored not specifically but in value in same species of property: therefore by the act of delivery the whole property vests in borrower instantly & absolutely: a mutuum therefore is no bailment. Doct & Sr. Jones 89. 90. 110. C. 250. Esp. D. 619. 1 Bac 241.

The third is locatio and conductio: a letting by the bailor and a hiring by bailee: locator is Latin for bailor, conductor for bailee. Id. Ray. 913. Jones 50. 119. 1 Bac 240. Bull N.P. 72. 1 Par 251.

Fourth is a delivery of goods as security for some debt due from bailor to bailee: called a pawn. bailor is called pawna bailee, pawnee. Id. Ray. 915 Jones 50. 104. Buller 72. Feb. 173. C. Litt 205

Fifth a delivery of goods to be carried on some act to be done about them by the bailee for which he receives a reward from the bailor. Id. Ray. 915 Buller 72. 3. 1 Par 253. Jones 50. 123. 144. includes a common or a special carrier i.e. public as well as private.

6th

Sixth a delivery as in 5th case but without reward, and this is Jones 73. the only difference between these two kinds (Ld. Ray. 913. Pow. C. 254.

Pro Jac 224 The Bailie in this case is called a mandatory: the bailment is called mandatum. This distribution is warranted by the case of Cogg & Bernard. Jones differs from all the common Law writers. These are the diff^t kinds of Bailment: now for the rules which govern them, and first as to

Sta. 531. 1099 Deposit: here the bailie not being benefitted is liable for Ld. Ray 913. no neglect: Doct & St. 129. Bull. N.P. 72. Jones 32. 64. 5. 102. 1A. 13. 15.

It is usually said that he is liable for gross neglect because it is evidence of fraud. 2 Bl. 452. Sta 581. Jones 13. 30. 64.

According to some the rule is thus: "Depositary is excused by ordinary care: but it is clear that ordinary is here used without any distinctive meaning: used by Pow. Ld. Ray. 913. bc: but he is not bound to ordinary care; the bailor ought to incur the risk as long as bailie keeps good faith: in fact a Depositary is liable for nothing but fraud: where gross neglect does not imply fraud he is not liable. If then Depositary treats his own goods of a similar kind in the same manner with

Burn. 230 those of bailor, he is not liable if they are lost: the fact of his Sta. 1099 own being lost rebuts all presumption of fraud. Ld. Ray. 913. Pow. C. 248. The reason is that the advantage is all on the side of bailor. By a special acceptance however he may bind himself to any extent. It is laid down in Southester case, the Depositary

4 Co. 83. b keeps the goods at his peril: but this has been denied ever since. Co. Litt 87. 2 b. Ld Ray. 455. 911. n. 913. 14. Sta. 1099. Com. Rep. 133. 135. Bull. 72.

Note distinction (now exploded). If one undertakes to keep goods, receiving a reward, he was liable: but without reward, no liability was incurred. (1 Bac. 241.) It is now fully settled that a delivery

How can Deposit. receive a reward?

of the goods is a sufficient consideration for enforcing the contract. And if A. makes an executory agreement that he will receive the goods as a depositary, he may refuse to receive them - for it was a nudum pactum. (Doct. & R. 129. 2d Ray. 909. 919. 12. Mod. 487. 3 Revers. H. of Eng. Law 246. 394.)

It has been also held in Southcot's case that if goods are left with a depositary in a chest, bailor keeping the key, bailee is liable only for box & not for goods: he had no power over goods. (1 Bac. 237.) But the law of bailment was not understood by 2d. Coke, and is denied by 2d Holt in Coggs & Bernard unconditionally. 2d Ray 914. 2d Holt not altogether correct: takes no notice of the fact whether bailee knew the contents: an important consideration: for how can he know what degree of care ought to be exercised if he does not. It is agreed that the nature of the goods ought to determine the degree of care - it is therefore the duty of the bailor to inform bailee as to the contents: otherwise he ought not to be liable except for gross neglect of box itself.

Under special agreement to keep safely, depositary is not liable for inevitable accident or irresistible force: he is ~~he is~~ understood to mean nothing more than that his want of care shall not be the cause of the loss. (Doct. sh. 130 1. Pow. C. 242. 9. Hob. 34.) He may may indeed make himself an insurer against all accidents if he expressly agrees to do it. If he agrees to keep safely he is liable for theft, unless he shows extraordinary care. He is not liable for robbery (Jones 63. 4 Co. 83.) Language in books is incorrect that agreement to keep safe does not bind him against wrong doers - a thief is certainly a wrong-doer and yet he is liable for theft.

Trover will lie against Depositary for detaining goods from bailor: also Assumpsit. -

2nd.

Commodatum. vide supra. the converse of a Deposit. In this case the Bailment is advantageous to bailee only, as where A lends B a horse to ride to N. H. Hence the bailee is bound to use than ordinary care, is liable for slight or the least neglect in case of a loss. (Buller 72 Jones 91. 1d Ray, 916. 11 Pow. C. 249. 50.) Ex. A lends B. a horse to use without pay. B. puts him into a stable, the door unlocked, the horse is stolen. B. is liable. Yet it would seem that the state of society ought to be considered: if both live in the same place, where bailor does not lock his stable. Qu? If borrower is liable if he puts him in pasture he would not in all cases be liable. A Borrower is at any rate, not liable for a loss occasioned by open violence, unless he exposed himself. (1d Ray 916. 11 Pow. C. 257.)

He is liable for a loss by mere theft unless he can prove extraordinary care: In most of these cases a great deal is left to the discretion of the Jury. - (Jones 61. n. 92.) But a borrower may subject himself to liability for inevitable accident: as if he should cross a ferry when a loss was highly probable: here tho' the proximate cause is inevitable accident, yet he is guilty of indiscretion in putting himself into danger. Borrower is not liable for lightning &c but he may make himself so by a previous breach of trust: as if he keep him longer Jones 95. b. than he ought to do: he loses the privileges of a bailee. 1d Ray 915. 11 Pow. C. 249. This last rule applies to all bailees: indeed from the moment he breaks his trust he may be sued for value of property in tow or &c. Cro. Jac 244. 11 Pow. C 253. 1 Bac 237. 8.)

3^d

Also by his own previous rashness he may become liable for any accident.

Conductio & Locatio. Hiring & Letting.

Here the Bailee acquires a qualified property in the thing bailed: and Bailor a right to stipend: both are benefitted and therefore bailor is bound only for ordinary care. 1d Holt says he is liable.

for the slightest neglect: but this is a mere dictum of Ld Holt. (Bull. N.P. 72.)
It is evident that the term was used unadvisedly: the language ^{1 Pow 257.} in the books is too loose. There is no authority for requiring any more than ordinary care: and this is all that he is expected to use from principle. Tho' Ld Holt has referred to the Roman Law, he does not use the best authorities. Jones (120) says mistake of Ld H. arises from mistranslation of Lat. Separation

* Pawn or Pledge. Delivery of goods as security for debt or duty due by bailor to Bailee. Ray. 913. Exp. Di. 624. Vadium.

This contract being advantageous to both parties, the liability is ^{Ld R. 917} as before, divided between them, i.e. ordinary care will excuse pawnee ^{Com. di. 523} in case of loss. (Salk 523. 1 Pow. C. 252.) It is said in Southcot's case ^{298.} that he is bound to keep them only as he keeps his own, ^{Jones 108.} however carelessly, ^{and liable only for gross neglect} because he has a property in them: but every bailor has a special property, and tho' that of pawnee may be higher yet the degree does not affect the question: (4 Co. 83. b.) Jones 105. 115
Hence he is not liable for robbery (Ld Ray. 916. 17. Salk. 522. Jones 61. 107. 9. 11.)

There is another strange doctrine in Southcot's case. i.e. if goods are merely stolen, pawnee is not liable: but Jones holds that he is: both ^{106. 7} wrong. Jones says a bailor cannot be considered to use ordinary diligence from whom goods are stolen: but the most prudent man on earth may lose his goods by theft, no care can prevent: this is a question of fact to be proved. Jones contradicts himself: he says a Borrower is liable ⁹² for theft unless he proves extraordinary care. In case then of theft the degree of care is to be shewn. (1 Inst 121. 1 Pow. C. 252.)

Pawnee's interest is determined by payment or tender on day appointed: and property reverts in pawnee both at Law & in Equity: for this is ^{258. 27} an express condition of Cont. Ac. Sac 244. Jones 111. Bull. N.P. 72. 4 Co. 83. b. ^{Salk 522}
Hence if after payment ^{a tender & demand of pawn on day of payment} the pawnee detains property he is from that moment ^{106.} a wrong-doer and becomes liable for inevitable accident. Exp. di. 625. Ld. Ray 917

Can. does the former judgment bar the action: the court decided not. (3 T. R. 125
1 H. B. 669. Doug 161. 2 H. Bl. 408.) vide annexed sheet. page 1.

If the pawnee having tendered & demanded his pawn, upon refusal by
pawnee sues, pawnee is yet entitled to his money. (1 Bulst. 29. 31. 1 Bac 238.)
for wrong of pawnee does not extinguish his debt.

Co. Litt 209. If perishable goods decay, pawnee is still entitled to pay. (Yelv 179. Talk 873.
4 Com. 358 And while the pledge remains unimpaired in pawnee's hands, he may
Yelv. 179. sue for his money unless there was an agreement contra. (Stra 919. 2 Lev 116 Expt. 20.)

If the money secured by a pawn is not tendered at the day appointed
1 Bac 238. property at law vests absolutely in pawnee: but pawnee has a right
of redemption in Equity as in mortgage. (Co. Litt 205. 3. At. 395. 2 Vern. 691. 3.)

But this right in Equity exists only where goods remain in pawnee's
hands or where he has merely assigned his own lien to another as
security for a debt due by himself: for if debt is not paid on day,
Christian pawnee has a right to sell and if he has sold, how can this remedy
Obscure in Equity exist? It has been determined in R. B. that pawnee is
22. U. p. 176. bound to refund any excess, arising from sale, over principal & int.

After day of payment, pawnor not tendering, pawnee may sell absolutely.
for legal estate is in him absolutely: but must refund excess. vide Chr. Obs.

vid annexed
sheet p. 2.

4 Com. d. 238.
1 Ols. 350

1 Bac 239

It has been said that pawnee may deliver property to his creditor with
his lien, before day of payment: i.e. substitute his own creditor.

but not law. D. G. knows of no case of bailment in which ^{bailor} may transfer his own
interest, the contract being fiduciary & personal: a master might as
well transfer his right to an apprentice. I may be willing to trust my
property to one man & not to another. (Yelv 178. Cro. Jac 244. 7 East 6. 5 T. R. 668.)

D. Buller says a lien is a personal trust & cannot be transferred: there
are strong analogies in support of this doctrine: thus it is a rule of law

More 100 that a pawn cannot be forfeited by any crime of pawnee before
2 Bac. 376. day of paymt, notwithstanding the rule that a man forfeits by

1
But I think this decision opposed both to analogy & principle: 1st An Admin^r claiming to be such by producing forged letters testamentary: now if the debtors of the intestate voluntarily pay this person they are still liable to the true Admin^r: but if they are sued & a recovery had agt them, the Law will not enforce a second recovery. So in the case of an Ex^r. claiming under a forged will: if Test^r's debtors pay volunt^{ly}, liable as supra: but if compelled to pay to wrongful Ex^r by process of Law, they are not afterwards liable to the real Exec^r. So if after an act of Bankruptcy the debtors of bankrupt pay their debts voluntarily to him they are still liable to his assignees: but if the Bankrupt goes into a foreign country and there sues & recovers from his debtors in his own name, they are not liable to assignees.

The principle to be extracted from these analogies is this: that the Law having once lent its aid to compel a person to pay a debt, will never compel him to make a second payment for the same thing.

Why do the principle and these analogies apply to the case of a finder who has delivered up the goods, or (which is the same thing,) an equivalent for them in compliance with a Judgment rendered in favour of a 3^d person? for these analogies vide 35 D. R. 125. 2 Bac 11. 1 H. Bl. 669. 682. Doug 161. Cook. B. L. 370. 2 H. Bl. 408. vide "Evidence" (Judge Gould) This was decided in Sup. Court of Conn. not reported -

2.

A factor cannot pawn the goods of his principal so as to give the pawnee any lien upon the principal (T. Mast & Serv. T.) the appears to be that the factor himself has but a lien, which is a personal right that cannot be transferred. (I think a lien can't in any case be transferred, at least not by a factor: for his lien arises out of a fiduciary contract.) J. G. He trusts the factor & gives him a lien till accts are settled; but he does not give him a right to appoint a new keeper. And in such cases it is now settled that the principal may sustain trover or holden after demand & refusal, without tendering to the factor the amt of his debt. For the very act of pawning is a breach of trust by which the factor forfeits all his rights as pawnee & becomes a wrong doer. (Str 117. 18. 37. R. 464. 1 H. Bl. 362. 7 East 5.)

Qu. does the former judgment bar the action: the court decided in the affirmative.

* and says pledge becomes a deposit after report: not so: Depositor is liable only for great neglect: but pawnor, after refusal, is liable for inevitable accident &c.

Co. Litt. 89
1d Ray. 917

He is also liable to an immediate action: in detinue because he wrongfully detains - in trover because it is a conversion: & in ass.

Co. Lac. 244. 1 Roll. 66. Jones 111. 1 Bac. 237. 8.) And by a breach of trust a bailee of every description becomes liable not only for all accidents, but immediately to an action adapted to the nature of the wrong.

And refusal to redeliver by the agent or servant of pawnor has the same effect as by master himself. (Salk. 441. Jones 126. Bull. N. P. 72.

If one pawns property to secure ^{even} a vicious debt, he cannot recover in trover nor in assumpsit, until he has tendered principal & lawful int: seems unaccountable at first, contract would seem to be void, as in case of Mortgage: but the principle is that both these actions are case & therefore any Equitable defence is good: this rule would not apply to Detinue.
* Refusal by pawnor is an indictable offence at com. Law: being an exception to genl rule, founded on policy. (Salk. 522. 3. ib 309. 4 Com. 253. title pawn (Contra. Carth. 277. 2 Hawk. 210. 1 Bac. 240. overruled.) It is intended as a protection to pawnor who is supposed to be embarrassed.

In some cases pawnor may use the pledge: in others not: but if there is an agreement, that governs, & the law is silent. The right is founded on the pawnors consent either express or implied. Presumption of consent is raised or not according as the thing pledged is to be improved, or injured by the use. also if use be not likely to injure, the presumption is that it may be used at pawnor's peril; he would be liable for robbery - not for inevitable accident which happens only in ^{case of} breach of trust. Bull. N. P. 72. Jones 113. Why is he liable for robbery since the law allows him the use of it? because it is a more indulgence and he must take a greater risk. (Salk. 522. 1 Bac. 237.

If pawnor is at expense in keeping pledge he may use it by way of reimbursement. (Salk. 592. 1d Ray. 916. Esp. dig. 625. Jones 114. Bull. 72. And pawnor would be the more liable for robbery because he used it as a compensation: here it is a matter of justice & not indulgence.

Not bound to account for any profit arising from the use, by com. law.
contra Roman law.

But if the property would be injured by use, ^{and the keeping not expensive} the law gives him
no license to use it: but if he would injured, and he be expensive it may
be used, as in case of an opere. Ld Ray. 717. Bull 72. Jones 113. 5 Bac 257.)

In all cases where the law does not give the license, nor the pawnee, 5 Bac 257
and pawnee uses it, he commits a breach of trust & is liable for trover &c. ^{trover}

The law as to pawns Ld Holt says, applies to goods found (Ld Ray. 917)
By this is meant that the finder is bound to use the same care & diligence
in keeping the goods as a ^{pawnee} bailee. (1 Par 252.) This is correct, but the
rule is denied in many of the books: as in Co. El. finder is not bound
to keep them safe, nor liable for negligence (Exp. di. 599. Lem 123. 1 Bac 240)

This is a mere dictum and is not law. — He is bound to use ordinary care. ^{Ld Ray}
As com. law allows no compensation to finder, ought he not to be regarded
as a depositary? the finder by volunteering to take charge of goods, incurs
a greater responsibility than depositary who is requested. ⁹¹⁷

But by our Law he receives a reward, and therefore the case is anal-
ogous to those beneficial to both parties: i.e. he must use ordinary care.

As to Co. El. the decision is right, but not the proposition that he is not
bound to ordinary care.

The finder of goods has no lien upon them for his expense or trouble: if he
volunteers to take them he does it at his own risk: 2 A. Bl. 254. 2 Bl. R. 1117. Sta 651.
As to wrecks the rule is different: he who preserves a wreck is entitled to
salvage: derived from principles of Maritime Law. (5 Bac 270. Ld Ray 293.)
A refusal by finder to restore goods to owner on demand is not of course
a conversion, this prima facie evidence of it: owner must shew reason-
able evidence of ownership. (2 Bulst 312. Exp. di. 570.)

A found goods of B. C presented his claim, A refused. C recovered on
trover. B real owner then demanded it - A refused - B brought trover

his crime whatever he can transfer by his contract. Co. Litt. 8. 12 Co. 12
Co. Car 556.) Book lays down the rule that a pawn cannot
be aliened before forfeiture. (1 Bac 238. 1 Ves. 359.) Besides what
what would be the situation of pawnor if pawnee can assign
his lien before forfeiture - suppose he assign to a villain & property
worth ten times amount of debt: pawnor cannot come upon pawnee
assignment being valid. — A made a pawn to B. B. before day ^{for 200} 2 Vern 691
of paymt pawned to C. A brought a bill ag't C. Court held that

A must pay C the amount of his debt against B. but note. A had a bill. i.e. he did not
tender upon day appointed, ^{being} vested absolutely in B and he had a right to assign ^{now} tho' he had none at the
time of his making it: it would have been otherwise if it had paid at the day, as he sought to prove he was bound to do it
he should have proved tender at the day or ^{for 200} ~~proven~~.

Another Analogy. After the pawn or pawnee's interest can be
taken on execution, merely because the property is fiduciary, & therefore it
cannot be transferred by pawnee himself. 1 Bac 238. 352. Dy 17. Owen 124.

The same principle governs in assignment as in execution: —

1 Bulst 29
1 Bac 238
clv. 179. Pawnor may forfeit for Treason: but King must pay principal debt: pawnor has only a ^{right of redemption.} 3
Hence the very act of assignment is a breach of trust: —

ac 238 It was anciently deemed essential to a pawn that the property
2d 357 should be delivered at the time of contracting the debt: non-essentials. Gelo. 164
2d 357 2d 357

It was formerly doubted where no day of paymt was fixed in Court.
whether tender of paymt would re-vest the title, unless made during
their joint lives. Since held that pawnor has a right to redeem

Ray 34.
1378. during his own life provided pawnee does not call on him sooner.
rule has been thus qualified in N. York. (Co. Sac 244. Gelo. 178. 1 Bulst 29. 2 Co. 79.
g.a. c. note

Now from Ch. Obs. it would seem that it must be redeemed within
twelve months and a day. Hence if a man pawns property without
fixing day, & he die even within 24 hours, his Executor cannot redeem. 1 Bulst 29
This rule ought to be altered and it may have been lately done. —

Yet admitting the rule, there would still remain a right of redemption
in Equity after his death: this rule results from the principle laid down in a

former rule. Where a day of payment is fixed, it is clear that the death of pawnee does not affect his right of redemption. 1 Bulst. 29. 1 Bac. 239.

5th

Goods to be carried &c for which Bailee receives a reward.

Ld. Ray 917.13.

This delivery may be to a private person or to a public carrier - and first of a bailment to a private person. A delivery to a private person includes delivery to one in a private professional character as tailor &c. and to factor &c. A delivery of cattle to an agisting farmer &c.

Jones 123.9

1 Roll 4

1 Vent 121

12 Mod. 487

Here the bailment being mutually advantageous, bailee is bound to use no more than ordinary care: Ld. Holt says reasonable meaning ordinary Bailees of this class are generally excused and always pura facie, from robbery: unless he was guilty of rashness in exposing himself (Jones 129. 130. 133.)

Holt. 131.

Co. Litt. 89.

In case of a loss by bare theft the rule is, if the property was locked up or kept with ordinary care bailee is excused. Jones 133. 1 Vent. 121. Ld. Ray 913. 2 Leo. 5.

1 Roll 4.

Jones says if pawne is lost by bare theft, pawnee is liable, mark inconsistency. vide case of silver being delivered to a smith, and he liable on all events, on the ground of its being a mutuum: he need not use the identical silver.

Jones 9.

founded on the principle that the subject is to be so changed that it cannot be afterwards identified; and he supposes it like the case of wheat to be ground, the flour is not deemed the identical subject.

Poph. 33.

2 Bl. 404.

Moore 20.

Hence he reasons that it was not intended to have the identical silver restored. If the case were that the silver was kept by itself, & it were stolen before it was manufactured, smith would not be liable; otherwise if he mixed it with other metals. Led. 21. ^{2 u. l. Law. Jour. 444.} _{19. Johns. 44.}

It seems to differ from the case of wheat. If lander detain bailee liable. 3 Bl. 8.

When the bailment is made to one who is to use his skill, the law implies a twofold contract: i.e. it is not only to be restored, but bailee is bound to perform the work skillfully: but if the work is not adapted to his trade, he will not be impliedly liable for want of skill (1 H. Bl. 158. Jones 128. 9. 137. 40. 1. 11 Co. 54. a. 3 Bl. 165. 6.

1 Sand. 324

Esp. di. 611

The reason is that by publishing oneself of a particular trade, the law implies a competent skill - otherwise there would be fraud. -

Ordinary care does not extend to fire: but this must depend very much on circumstances: as whether bailee live in country or city: in the latter case he ought to insure: want of it amounts to neglect.

If goods delivered to bailee and goods be destroyed while they are unfinished Del. whether he is entitled to compensation for the la. Exp. 86. or bestowed upon it? D. G. thinks not: bailor is not benefitted. 3 Burr. 1592.

2^d. As to Common Carriers.

Ex. di. A common carrier is any person in general, who makes it his business to transport the goods of others from place to place for hire, as waggons, porters, ferry men &c. 1st. Ray 913. 4. Co. St. Ro. Car 330.

It was formerly doubted whether any other than a carrier by land was included: settled contra in James 1. Hob. 17 Cio. &c. 330. Sims 149. 238
Ex. di. extended to shipmasters in Car 2. Ray 220. 1st. Ray 913. Sims 152. 11 Vent 190.

Ship owners are common carriers: and the action may be brought against either the master or the owners: when agt owner, it is in nature of an action agt com. Carriers Exp. di. 623. Talk. 440. 17. R. 1373. 3 Lev. 259.

There are two stat qualifying the injury done by masters & Mariners, being Geo II. c. 15. and 26 Geo III. c. 20 the effect is to limit liability of owners to the value of the ship: the master remains liable for full value: not Law here. 17. R. 1378. Marsh 160.

A com. Carrier implicitly undertakes to carry the goods of all persons on his route, to the extent of his convenience: and he is liable to an action on the case if he refuse being offered his hire, and having the convenience. He may in all cases demand his hire beforehand. Bull. N.P. 70. 3 Bl. 166. Hard. 163. 2 How. 327.)

But a com. Carrier may make a special acceptance, i.e. impose conditions and terms: thus he may agree that he shall not

Every thing is deemed necessary which the law does not exclude. - 1 Will. 282. -

answerable for articles very valuable in proportion to their bulk, ~~and~~ ^{unless} receives hire ad valorem: and he may refuse to carry them if these terms are refused. (Esp. di. 622. 4. Burr. 2298.)

This bailment being mutually beneficial to the parties, both are equally liable: according to the genl rule bailor is liable only for ordinary neglect: and this was the case in the time of Hen. 8. But in the reign of Elizabeth it was determined that robbery was no excuse: and he is now liable for all losses occasioned by any accident except the act of God, the Kings enemies, or the bailor himself. (1 T. R. 27. 1 Will. 180.

1. Wils 281. 1 Pow. C. 253.) Now this extended liability is founded not on any principle of justice, but of public policy: lest carriers should combine with robbers: bailor can have no control over them: their opportunities

are so great for colluding, embarralling &c. - Ld. Ray. 913. Jones 145. 1 T. R. 34. Ld. Coke says he is liable to this extent by reason of the reward - but ^{only} not private carrier liable on account of his reward? it is true he is not liable to the extent of the rule unless he does receive reward: for in that case he would not be a com. carrier but a mandatary.

A com. carrier then is an insurer agt all accidents except those mentioned. Some dispute as to "act of God". Ld Mansfield defines inevitable accident to be one that can't happen thro the intervention of man: Since fire is not inevitable accident. (2 H. Bl. 113. 1 T. R. 34. Esp. di. 620.) vide loss by rats. 1 Wils 281. Bull. N.P. 7. Jones 147. Jones says unreasonably that permitting rats to be on board of ship is ordinary neglect.

Com. carrier is ~~not~~ liable for the acts of rebels, mobs: but not of Pirates.

1 Mod. 35. at sea: but different as to fresh water pirates. (1 Vent 237. 1 T. R. 13. Esp. di. 620. 2 Roll. 157. Jones 157. 2 Bull. 280. But if tempest or any other necessity makes it necessary to throw goods overboard, carrier is excused; inevitable accident is the cause. (12 Co. 63. Esp. di. 620. vide contra in case of a box of jewels, where box was not of sufficient weight to make it necessary to save the ship. Allegre 93. Jones 157: badly reported.

But in all these cases, the loss must be divided between the ship-master, owner, & freight according to Law Merchant: Jones is incorrect in including passengers: nothing is brought into this average but what may be deemed a part of the cargo: each man's loss is in proportion to the amount of his goods saved by the operation - 2 T. R. 407. Brown 148. 3 Bac 574. 5. 1 East 220. Marsh. 456.

The com. carrier is excused from inevitable accident, yet if he rashly expose himself to it, he is liable for the loss. (Sta 128. 1 Conn. R. 487.

nd. 621 He is not liable for loss occasioned by act or default of bailee himself. Bull. N. P. 69. 74.

On same principle, if bailee overload the waggon, bailee is not liable if it break. 1 Bac 344.

To subject carrier, goods must have ^{been} lost while under his care & control: 8 Johns 170. if their owner send a servant to protect them, and they are stolen, he will not be liable; unless loss is occasioned by his own act or neglect:

And however it happen he is answerable if he be in any way the cause of it.

Law. 371. 2. for want of ordinary care as a private carrier. Bull. N. P. 70. Sta. 690. 1 Bac. 344.

* The reason is that goods are not deemed in the immediate possession of carrier, ^{to have an eye to them} But requesting a passenger ^{to have an eye to them} does not exempt carrier from his liability. 300. 17.

It seems that a com. carrier tho' ignorant of the contents Carth. 485-
ll. 7. of a box is liable unless he exempts himself specially. (2 East 128. Jones 148. Sta 145-
this is a correct rule ^{as to com. carrier} tho' it has been questioned in regard to a depositary:

for Depositary is liable for nothing but ^{want of} good faith; but liability of com. carrier does not depend upon his care, i.e. 2d degree of care will excuse him.

148 Allen. 93. 3 Refb. 135. Doct & T. 130. Both cases overruled. 4 Barn. 2800. Sta. 145. 1 East 610-

Law. 305 To make a special accept, there need be no personal communication - pub-
lic notice in a newspaper will answer the purpose: and if any find that
bailey had read it, he would be bound by terms. (Carth. 485. Bull 71. Esp. di. 622.

Under a gen'l acceptance, carrier is liable for all he receives, unless he be deceived - but if he accept specially, he is liable for so much only as his reward extends to - as to any thing more he acts under a special acceptance) not as common carrier. (Carth. 485. Esp. di. 621. Bull. N. P. 70. 1.

A com. carrier may prescribe a condition still more strict: thus he may stipulate that he will not be answerable for any part of the article, unless he be truly informed of its nature. 1 A.B. 298. 4 East. 374. 6. 16. 561. Exp. di. 622.

Exp. di. 622. Master of a stage coach to carry passengers, is not liable for the loss of the Bull. 70. baggage; but if he receive hire for it, he will be liable. Com. R. 25. Talk. 282.

Com. carrier is liable as such without any express promise from bailor to pay hire - for he has the power to demand it ^{or afterwards by a separate contract} beforehand. (1 Bac 343.)

To charge a carrier it is not indispensable that goods be lost in transitu:

1 Bac 345. if they are lost at an inn where he arrives at end of route he is liable
Exp. di. 623. if it is the custom to deliver to consignee: and he is liable until delivery
2 B. R. 916.7 unless the custom is to the contrary: he has no right to leave them at an inn
3 B. R. 429. where wage is not to deliver to consignee, but to be kept by carrier

in his own warehouse, he is ^{not} liable after deposit. Thus the carrier

by water usually has a warehouse; still he may be liable in a diff't
L. R. 531. character for want of ordinary care, if he receives storage: otherwise he
Exp. di. 623. would rather be a depositary. Du? how far price of carrying would subject him

Comp. 294. If the consignee of goods direct the carrier by whom they shall be
B. R. 330. carried, he has the action ag't carrier. 3 Comp 354 P. C. 343. 53. E. di. 193. Bull. 35.

- for consignee is bailor, consignee is mere agent: hence the loss of any
is to be borne by consignee. (Comp. 294.) But if consignee select car-
rier he is entitled to the action. - So too if A orders B to transmit goods,
and B makes himself liable by agreement to pay the fare, he may sue

1 Selw. 313. n. in case of loss: he is now principal. (8 T. R. 333. 5 Burr. 2680. 12 R. 659.)

But if one orders goods, not naming carrier, vendee is liable as between
him and vendee. (3 Bos & P. 332. Exp. di. N. G. 2d. 42 B. R. 330. 1st 243. 1 Selw. 312.)

Talk. 240. When an action is brought ag't shipowners, it is said they must all be
Exp. di. 623. sued, otherwise the suit will abate - the action is by contract: But this
rule is too generally expressed: better thus; if they are sued on contract
5 T. R. 649. it is so: but if the action sounds in tort, they may sue separately.
3 East 62. 7.

The liability of owners is founded on fact that master is their servant: but if an action on Court is brought agt one of the owners he must defeat it by a plea in abatement: the fact of deft. having a partner, does not deny his promise. (5 Burr. 2611. 14. 5 T.R. 651.) rule applies to all contracts jointly made. Lord Holt held differently. Salk. 440. now overruled. -

At com. Law Post. M. was com. carrier, and liable as such: for there was no regular establishment: but now he is not. (Jones 153. Salk 17. Couph 754⁹⁴)

Mod 227 The old books all represent a com. carrier as liable by custom of the realm.

but this allegation is unnecessary & negatory. (Id. 245. Hard. 485. 12 T.R. 33. 136. 314)

When property is stolen be so as to subject him, he being guilty of no misfeasance, the remedy agt him is by a special action on the case:

Trove will not lie: but if there be an actual misfeasance, trove will lie, and some other actions: for a misfeasance is a conversion. (Salk 655: Exp. di. 570 8 Co. 146. 5 Burr. 287)

The case of lun Keepers falls under this head: (Jones 130. 32.) but vide Title of Lun. Keeper.

Esquiass treats of this subject under the head Commodatum: very improper - the cases are entirely & obviously different & distinct. (Exp. di. 625. 6.)

This bailment is mutually advantageous, and lun keeper would naturally be liable only for ordinary neglect - but his liability has been extended on principles of policy: his liability is somewhat less than that of com. carrier. He is clearly liable for any loss occasioned by his servants in any manner: (Exp. di. 626. 3 Co. 32. 3. 1 Bl. 430.)

If the goods of a guest are stolen, he is liable whether there be neglect or not: as if his house were broken. (Cro. Jac. 224. 8 Co. 32. a. Jones 134.)

Part of goods are stolen by ones own servant or travelling companion, lun keeper is not liable: nor for theft committed by a person lodging in same room by his request. (Cro. El. 285. 8 Co. 32. a. Cro. Jac. 189. 224. 5 T.R. 276.)

The case of a loss by common robbery lun keepers liable. (8 Co. 32. a Jones 135. a. b. Some inconsistency in books. Plowd. 9. 3 Bac. 182)

Jones says "a force truly irresistible" excuses innkeeper "tho not a com-
carriage: a loss by not would therefore excuse him -.

By Rom. Law, from which ours is almost copied, nothing short of
involuntary accident excused him. Lord Coke says he is excused unless
there is a default in himself or servants. not Law - and denied by J.

Exp. di. 626. Buller who says 5 T.R. 271. that it is not necessary to prove negligence.

3 Co. 32 b. But Goods must be *intra hospitium* which extends to out houses.

If goods are removed from inn by direction of guest, Inn keeper is not
liable; as if horse be sent to pasture: but if innkeeper sent him he would
be liable. 3 Co. 32 b. 1 Roll. 4. Bull. 73. Exp. di. 627.

6. 15

Mandatum. a Gratuitous Carrying.

Improperly called commission by Powell & Ball. N.P. 73.

As this is a bailment in which bailee receives no benefit, it differs
from a deposit only in this: that the duty of depositary is in custody,
of Mandatary infeasance. Hence he would be liable only for
gross neglect. See Rayd. 909. 913. 1 Pow. C. 255. 1 H. Bl. 153. 161. 2.

But there may be an express or implied engagement to use all ne-
cessary care & skill. (1 H. Bl. 161. 2. Jones 74.) If a mandatary engages
to use a particular degree of skill, the omission is gross neglect: not true.
for it would equally apply to all bailees. (J. 6.)

If a tailor offer to make a suit of clothes gratuitously, he is still bound to
use his ordinary degree of skill. (Exp. di. 601. 1 Lamm 324. 3 H. Bl. 165. 6.)

Jones says there is a distinction between a mandate lying infeasance and
Jones 61. 70. in custody; greater diligence is required in former, i.e. to use all necessary care.
1 H. Bl. 153 No authority, no propriety in the distinction: opposed to the doctrine in 3 H. Bl. 6. 165. 11.

Where there is no agreement express or implied that mandatary will use
11 C. 255 more care than he takes of his own goods, he is liable for gross neglect only.
But if he undertake a piece of work of his own trade he is impliedly engaged to
use all due diligence: but this does not extend to ^{accidents from} causes unconnected

with the labour: thus tailor is not liable for the loss of clothe unless gross neglect is shown: this point is clearly proved in (2d Ray 918. Bull. 72. 11 W. C. 255.)

But no bailor can exempt himself from liability for fraud, by any special acceptance: such a contract would not bind bailor: contra bonis maior sones 66. 75

Mandatory when liable at all is so for wrong and not for breach of cont. so laid down in books, but seems wholly incorrect in principle & authority: thus if A promises to take the goods in future, he is not bound to accept:

but if he accept on any terms, he is liable for any breach of cont. La Ray 909. ^{3 East 82.} ¹⁰ on ground that delivery is suff't considerable. (5 T. R. 143) Dec 5 & 129. 12 W. 487

This point was decided in Cio Jac 667. vide Carte 460 108.) Sones himself seems to adopt this notion. He says further if A agree to carry goods of B. ostend and refuse, and goods are damaged B will recover: but this is not Law.

But if fraud could be shown as if A never intended to perform, he might recover, by fraud, but not on Cont which was not binding: Sones 71.

On the other hand where Mandatory has received the goods, he will be liable for any loss occasioned by his breach of Cont. vide 4 Johns. 84.

General Rules.

When has bailor a lien on goods in his hands? a lien is a direct incumbrance upon the property by way of security for some debt or duty accompanied by actual possession. (1 East 4.)

This lien exists only in 4 & 5 class of bailment. From the moment pawnee receives the pawne, his lien is established: but in 5 class lien is acquired by performance of labor and not by delivery (Cio Jac 2445. Salk 522. Gelo 173. ^{Ex. 453.} ^{R. Ch. 619})

Most bailors of the 5th class when they have discharged their duty have a lien until they are paid: but not all. The lien is created differently in 4 & 5 class. in 4 by cont. in 5 by Law (4 Hob 42. 3 Bac 185)

But a third person who wrongfully obtain possession of goods from bailor cannot avail himself of this lien: bailor may maintain an action as if goods had been in his own hands. (3 East 585. 2 T. R. 435. 8 Co. 147.)

Hence Com. carriers may detain goods for ever if they are not paid.
(contra Id. Ray 67. Powell L.). Talk 654. 2 New R. 641

If a thief deliver goods stolen to Com. carrier, he may detain them: for
Id. Ray 867 he was obliged to accept them.

To Innkeeper may detain the horse of his guest until charges are
Esp. di. 534. paid which were incurred by horse. 3 Co. 147. Talk 388. Id. R. 163 Bull 40.

And if a horse thief should leave him, Innkeeper may detain
Poph. 128. 77 him agt owner - for he was not bound to demand ^{and was bound to receive him} payment beforehand.
Esp. di. 186. Delv. 67.

To Innkeeper may detain person of guest till the whole bill
is paid: the horse can be detained only till the expense of his own
keeping is paid - horse not liable for his master. 3 Bac. 2 Roll 85; 1 How 20.

But a lien is always lost by voluntarily abandoning possession
1 East 4. of property - but if goods be taken by force & the lien remains, Sta 557; 1 Burn

Delv. 67; 106. 42 If a Tailor has a lien upon a garment which he has made (3 Co 147. a)
and therefore is not bound to accept
Mechanic does not act in public capacity - still this privilege is al-
lowed by law in behalf of trade & commerce: But where Mechanic
has been in habit of trusting a customer without urging a lien,
he cannot subsequently assert his lien (Bac 240. n.)

But an agisting farmer has no lien: he is not bound to re-
1 Bac 240. ceive the cattle: but this distinction arbitrary. Cro. Car 197. Bull 457.

Captn of a Ship has no lien upon goods for his wages: he is supposed
12 Mod 440 to rely upon the personal responsibility of owners. Doug. 95; Abbot. 140. 166
1 Doug 49. 1832. Tal 12 33.

But Mariners have a lien upon the Ship & rigging: they are pre-
sumed to rely only on the Master; and crew may libel the ship
and sell her for wages: hence a cont is made that they shall receive
only at certain ports. (Doug. 101; Sta. 937. Abbot 459.)

On the other hand where there is a special agreement on which bailer
relies, he has no lien "expressum facit cessare tacitum":

Hence it was held in case of farria, that ~~he~~ had no lien, because he

had entered into a special agreement for payment of a certain sum. 2 Roll 92. Exp. di. 586.
S. G. contra. how does mere fixing of price affect right to payment: and in S. G. ed.
2 Selw. N. Progs. the rule has been denied: also 2 Marsh. 345. 349.

A factor has a lien on goods of his principal while he has possession: So in case 2 Bl. 2154.
of broker, auctioneer &c. vide Master & Ferch. 3 T. R. 119. Com. di. March 4. B. Amb. 254. Exp. 108.
1 Bur. 494

A Bailee of 2^d or 3^d class has no lien whatever: he has a ^{Gelo. 172.}
right to detain it the stipulated time even ag^t owner - but this is no lien.
11 Bac 240

Depositories and Mandatories have no lien for they are to receive
nothing for their undertaking. —

How far the rights of strangers are affected? If one man bailees as his own ^{1 Bac 42}
the property of another the bailee must redeliver to the person who gave it. ²³⁷
but the fact that bailee cannot judge is no imperative reason - it means no
more that bailee is justified in redelivering to bailor: the law does not intend
to confer a right on bailor, but to protect bailee: thus it is held in Roll that
if bailee redeliver to bailor pending an action between bailee and owner the ^{1 Bac 242}
delivery will bar the action. — ¹³⁷
2 Selw. 807

It is held however that if bailee should die, Executor is bound to deliver
to true owner and may not deliver to bailor: because it is said, as executor
acquires his title by Law, he ^{must} dispose of it according to Law: but artificial.
for bailee might have delivered to bailor and why not Executor? this dis-
tinction is not made now. (1 Bac 237.

Creditors sometimes seize goods bailed - & bailee sometimes sells
them as his own: now what is to become of bailor? Com. Law rule is
that where a man's goods have gone wrongfully into another man's
hands he may recover them: And where bailee who sells &c is solvent
there is no necessity for either party to suffer: But where he is insolvent
arises the difficulty. In Eng? regulated by Stat. 21. Jac. 1. If a bailee
become bankrupt goods are liable for his debts. (1 Atk. 166. 1 Bos. & P. 32. 10es 348
7 T. R. 228. 8. d. 82.

This Stat extends only to a possession by persons becoming bankrupts, 2dru R. 67. Creditors of bankrupt bailee have their claim not upon ground of fraud between bailor & bailee, but of false credit derived from possession of goods: & A allows his property to be in hands B. Baquire a false credit, and therefore they shall be liable. 1 Ves. 364-372. Esp. di. 566. possession of personal chattels being presumptive evidence of ownership.

If then vendee can prove that the goods were purchased bona fide for valuable considⁿ, even this will not avail him; i.e. creditors will hold goods of bankrupt vendor. (1 At. 180. 1 Ves 365) This Stat seems to be in affirmance of the com. law principle that when one of two innocent persons must bear the loss of a third, it must fall upon him who causes the difficulty. -

3 J. R. 618. This Stat does not extend to goods in possession of a bankrupt by right of another: as in case of Guardian, for ward cannot prevent this possession. So of property of the wife to her sole & separate use in hands of Husband. (1 At 159. 8 P. Wms. 187.)

But it extends to mortgages of goods as well as to absolute sales, if Mortgage remains in possession: for public knows nothing of this mortgage, he has the apparent ownership by permission of Mortgagee, who ought to have taken possession. 1 At 165. 1 Ves 348. 1 Will 265. Esp. di. 566. Robt. f. com. 45th Rule does not apply to Mortgage of land: for as to real estate mere possession is no evidence of ownership and no false credit arises from it.

1 Ves 361. 2dru R. 67. Nor does Statute extend to sale of ship at sea - because immediate possession could not be given: but if purchaser permit vendor to keep possession after he arrives in port, she will be liable. Robt. 549, 571. 2 J. R. 462nd Esp. di. 566.

And there are other cases in which actual delivery of goods sold to vendee is not necessary as security ag^t creditors of vendor in case of bankruptcy: as of vendor deliver key of warehouse &c. 7 J. R. 71. 2dru R. 67. Esp. di. 577.

It is not necessary therefore that there should be fraud proved between bailor and bailee in cases under this Stat.

But vendor must have ^{apparent} absolute control by consent of vendee: for if they were locked up & laid aside the case would be diff: a temporary possession for a particular or convenient purpose does not subject the goods in case of bankruptcy. 1st. 135-
Exp. di. 587
Fell. 147
206

The bankrupt in possession then must appear the actual owner in all respects and with the owner's consent: hence if from known nature of bankrupt's business presumption of ownership is excluded, the goods are not liable, as in case of a factor &c. As to private bankers called Goldsmiths 1P. 181-37
3d 183-
184-185
Exp. di. 570

In some cases of bailment, as where bailee is not ostensible owner by owner's consent, the stat. does not apply: here owner may reclaim his goods against all creditors and purchasers "except bankrupt"; the genl rule that true owner may recover in any body's hands obtains in this case. 1 At. 44. 10 Wils. 8. 2 Stra 1187. Salk. 233.

This rule however does not ~~in~~ hold in case of money, bank-bills, or bills of exchange; a regular transfer by bailee tho' in breach of trust, will bind the property. ^{transf. by delivery}

Salk. 126. 1 Burr. 452. 453. 3d 1516. 1 Bl. R. 485. Exp. di. 39. 579. 80. The reason is that these articles form a currency, and must pass j. But Bly. must be transferable by delivery &c. The principles of this stat. have been adopted in our Courts of Com. Law. To bring a case within the principle of this Stat. 1st The person must become insolvent: 2^d he must ~~do~~ with the owner's consent, have the appearance of actual ownership: a creditor then of bailee who takes property in execution, cannot hold against owner, in any case however strong the evidence of ownership, unless bailee is insolvent: for otherwise, there is no need of depriving bailor of his property. And even where he is insolvent, the property cannot be held ag^t bailor unless the possession was such as to give him false credit, with consent of owner. 1 Bos. 32. 3. 643. Doug 366. Bly. com. 333. 4

So if goods are left in possession of vendor for a particular reasonable purpose, they will not be liable: thus.

If goods are bailed for hire for a limited time, can creditor claim bailee's interest or lease? D. G. thinks not: inference contra 7 S. R. 11. 12: but that case proceeded on the principle that lessee in being liable, furniture was deemed an appendage

5 T.R. 604
7 East 6.

and therefore liable with them: but in case of bailment bailor can not assign his int. contract fiduciary and therefore they ought to be exempt!

1 Roll 4.

2 Bulst 263

Bailor's right of action agt Strangers: It is a general rule that bailor having gen'l property, may recover in trover &c agt any stranger who injures the property in hands of bailor. 5 Bac 154. 2d Tres. for all personal property, possession law is supposed: i.e. a right of possession. (1 id 433. 2 Roll 569. 10. R. 430.) But if at the time of injury done bailor has not right of possession, he cannot maintain either of the actions: as

8 John. 432

7 T.R. 9.

if A pawn to B for six months and C injures them in the meantime, trover will not lie: B might - he has the property. 4 T.R. 489. 1 id 430. Ex. di. 383. 576.

As soon as time of bailment expires, he may sue wrong doer for detaining. the true principle is that if bailor could maintain these actions he must recover for the original immediate injury - but this would be in derogation of bailor's rights: but why not Trover? because tho' he has gen'l property, it is in nature of a reversion a remainder, and he has no right to demand possession of goods, which is necessary to the action. Wrong doer's refusing to deliver to bailor does not amount to conversion.

2 Ph. 20.

1334. It is said that bailor may maintain an action on the case ^{2 id 329. in} Chitty Pl. 167. 804.

But if goods are wrongfully taken from Depositary on demand at any, the bailor may maintain Trespass or trover for the immediate injury: bailor claims no right of possession and of course remains in bailor, and bailor can always sue when he has a right to countermand the delivery at the time the injury is done. 5 Bac. 3c. ut supra.

If Bailor deliver goods into the hands of stranger, bailor cannot maintain Trespass, nor Trover without demand: 5 Bac. 164. 261. 1 id 237. 1 Roll 606. 7 - but rule holds only where there is no breach of trust. 7 East 5. but stranger may bar the action by delivering back to bailor ut supra. 1 Roll 606. 7. 2 id 367.

In all these cases Bailor may maintain Trespass or Trover where there is no breach of trust: except Depositary & Mandatary

formerly, but now they may. (5 Bac 165: 262. Ld R. 276. Bull. N.P. 33. Exp. d. 577. Park 140

But at this day a finder may maintain an action agt wrong doer. Sta 505. Bull. 33. Exp. 577-
a fortiori Depos. & Mand: they are sometimes said not to be able to sue because
they are not liable over to bailor: but the right of the bailor does not depend
upon this ^{liability} right: it is his special property, i.e. his lawful possession ^{incl. 264.} agt. d. 392. 8. Exp. 577.
Hence a mere findr may sue the hundred for a loss by robbery - ^{Li find 404. Comb. 263.}
but the findr is not liable over to master. 2 Saund 380. 13 Co. 69.

Yet if a house in possession of tenant for years is blown down, he may sue
stranger for carrying away property. Buller 33. Exp. 575. Vide as to Bankrupt 11 B & P 44.

But admitting the reason, the rule is not correct: no bailor is liable at
all events and every bailor may be: in an action by bailor agt ^{wrong doer} ~~bailor~~ the bailor's
liability cannot be tried, therefore it cannot be the ground of action.

If a Bailor deliver the goods to a Stranger, the Stranger may have the action
(1 Roll 607. 5 Bac 260. 242.) a fortiori Depos^d & Mand^d. 1 H. Bl. 242. 1 Bac 242.

There are some cases where Bailor may sue on Cont: as where he lawfully sells.
thus an Auctioneer may sue the highest bidder, tho the goods were declared
to be the goods of another: but a com findr or clerk cannot. 1 H. Bl. 31. 2 ib 571. 2.
1 Chitty. Pl. 5 who says the beneficial int, viz, the commission is the ground of the
action: I. G. says because the contract is in their own name (Park. 403. 1 H. Bl. 32. Bull. 180.)

Since the Bailor & Bailor may either of them have an action: but when either
can sue, there can be but one recovery: and the action of Trespass a Trover by
one bars the action of the other for full value (13 Co 69. 5 Bac. 165. 263.)

It is sometimes said that "he who first recovers will oust the other": but from 2 Roll 569
analogy "he who first commenced the suit" attached in himself a right to sue
which will exclude the other (Latch 127. 3 Bac 557.) 8 Vin 22.

If the Bailor has recovered satisfaction of wrong doer, he cannot after-
wards sue the Bailor: 2 Ray 217. Co. Car 24. 35. 3 Leo. 124. Talk 11. Exp. d. 319. Teller 68.

But further if bailor commenced his action agt wrong doer, the bailor is
ipso facto discharged: agreeable to analogy. I. G. vide exp. 610. Co. Car 77. 109. 35. R. 65.

On the other hand if Bailor first commences the action ag^t wrong doer for full value, he makes himself liable at all events to Bailor: for bailor is deprived of his action of the same nature.

The Bailor may sustain an action for special damage independent of the property: thus if A bail a horse to B. & C take him: B may sue for value of horse, & A may recover for the loss of the use: no precise authority, but is founded on the principle that a wrong affecting two persons may be satisfied as to both. (55.R. 65)

If Bailor wrongfully take property from bailer, he is liable in a special action on the case: or on contract. 5 Bac 185, 266. Esp. d. 451. Trespass & Trover would not seem adapted to the case: & d Coke contra. Bailor's special property entitles him to recover for full value ag^t a stranger: but he cannot recover full value ag^t owner, & therefore there is no propriety in his bringing these actions. (Sta. 555. Esp. 575.)

In Genl. Bailor can only maintain detinue, trover, or a special action on the case; not Trespass ag^t bailer: because the bailor's possession was originally lawful. Bull. 72. Co. El. 781. Co. Jac 244. 3 East 62.

But if a bailer wantonly destroy the goods Bailor may maintain Trespass: and this is the only instance in which he can: the bailer forfeits all the immunities of a bailer; his possessⁿ becomes wrongful. 8 Co. 146. 5 d 13 b. Co. Litt 57. a. Park. sect 191. 2 T. R. 465. contra 5 Bac 266.

* The reason why the Bailor sues for full value in any case, is that he may recover for the Bailor: but in this case the bailor has recovered himself, by taking possession. —

End of Bailment.

13. Co. 48
69.

10 d 559. 61.

2 d 319.
1 Wils 282

Inns and Innkeepers.

At com Law any person may lawfully exercise the office of an innkeeper: unless they become so numerous as to be a public inconvenience: in which case the Inns last established become nuisances; and are indictable at com. Law. No license was required. He who assumes the character becomes liable to the duties. 4 Bl. 168. 3 Bac 178. 9. Co. Cas. 549. 1 Roll 86. Co. Dec. 594.

An Inn by becoming disorderly becomes a nuisance & keeper subject himself to indictment. 1 Hawk 198. 228. 4 Bl. 168. Co. Cas. 549.

But at present a license is necessary under penalty of the Law: lately established in N. Y. & in most of the states: so of Ale houses &c.

The duties of Innkeepers extend genly to entertaining of travellers and protection of their property: not of their persons. 19 Co. 87. 3 Bac 180. 1. 8 Co. 32.

Hence if person of guest is beaten, Innkeeper is not liable. 8 Co. 32.

But if he refuse to entertain a guest without ^{cause, upon} a reasonable price tendered he is liable in case to the guest, & to indictment at com. Law. 1 Hawk. 262. 4 Bl. 168. 3 Bac 181.

He is only bound to entertain Travellers: not neighbors &c.

He is not discharged from his liability for goods, either by sickness, absence nor insanity even. Co. El. 622. 3 Bac 182: rule may seem harsh but is required by public policy.

But an infant innkeeper is not liable: for he can make no contract: which is the implied ground of their liability. 1 Roll 2. 3 Bac 182. Carth 161.

There are causes which may excuse Innkeeper from receiving guests: as if his family be sick, tavern full &c. (3 Bac. 183. Dyer 158.) note analogy to the case of Com. Carriers.

If Host request guest to lock his door, and he refuse or neglect to do so, is he liable in case of loss? J. G. says not: authorities contradictory. 3 Bac. 183. Dyer 266
Moore 73. 158.

If guest take the Key and neglect to take the precaution of locking, not having been requested, the Host is responsible. 3 Co. 33a. 3 Bac 183.

The Host is liable tho' he does not know the nature of the goods: if he be deceived the case would be analogous to those of com. carriers: except that com. carrier can demand reward in proportion to value, which inn-keeper cannot. 3 Bac 183. 5 T. R. 273.

He is liable to the usual extent to those who stay at his house paying the same fare as travellers: but not to boarders at the price given at private houses: he does not act in character of inn-keeper towards them. 3 Co. 32b. 1 Roll 3. 3 Bac 183.

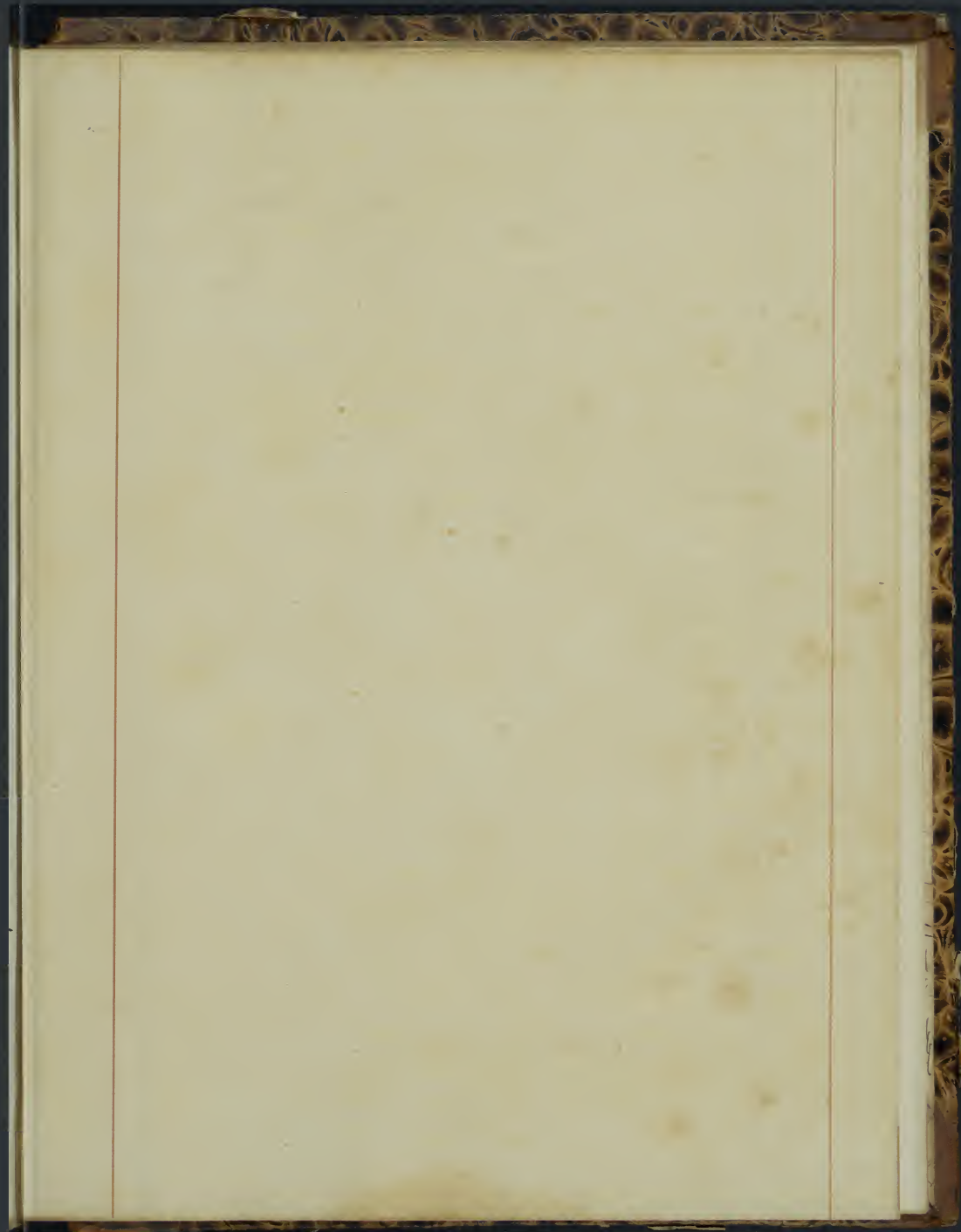
Nor is he chargeable as inn-keeper (tho' he is as Depositary) for keeping goods for which he receives no profit: as a trunk &c: but while the owner is a guest he is liable, 3 Bac 183. Co. Jac 188. 5 T. R. 273. 100 126. Poph. 179.

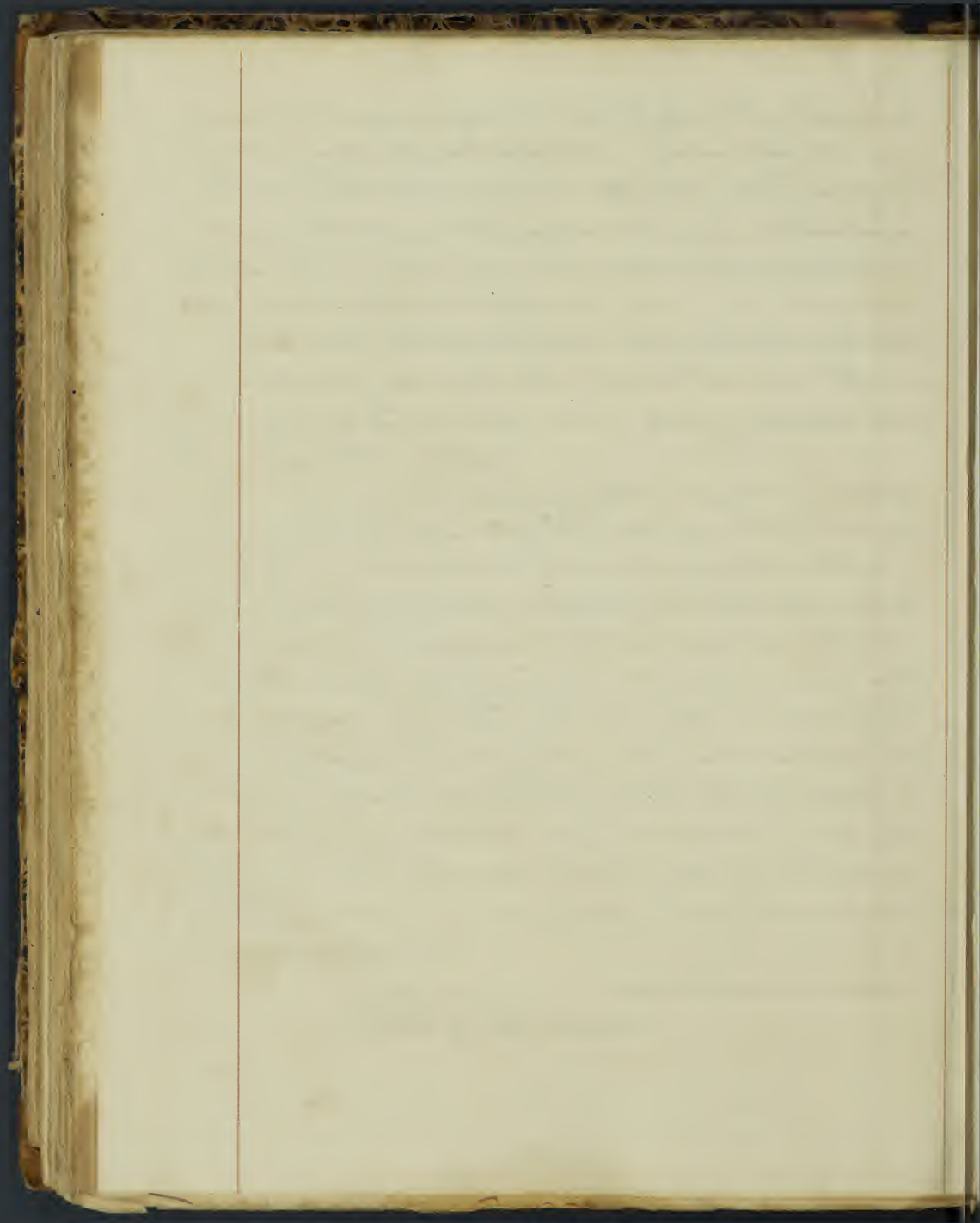
Yet if he receives profit for keeping the property, he is liable tho' owner has left the house: as a horse &c. Co. Jac 188. 100. 126. 11th. 388. 1 Roll 3.

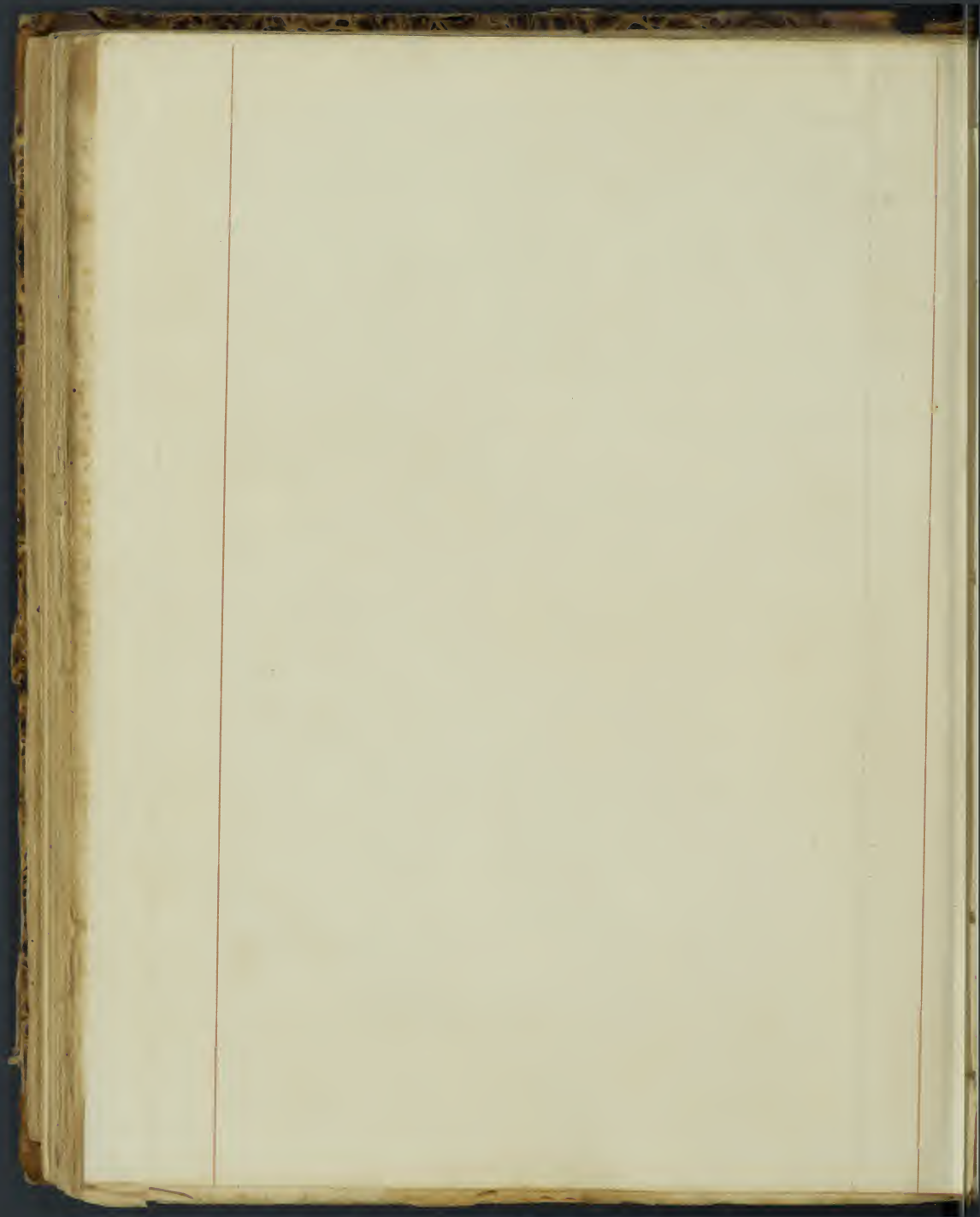
As to his remedy agt his guest, he may maintain an action on the implied contract. and further he has a lien on the person & goods of his guest. (Carth. 150. 2 Roll. 85.) He may detain horse until expense of horse-keeping is paid. And if guest sh^d leave the inn without his permission, he may take him: yet if he consent to his going before paying his bill he relinquishes his claim. He may not use horse &c which he detains: as in case of distress; license of Law does not allow it. (Sta 556. 3 Bac 185.)

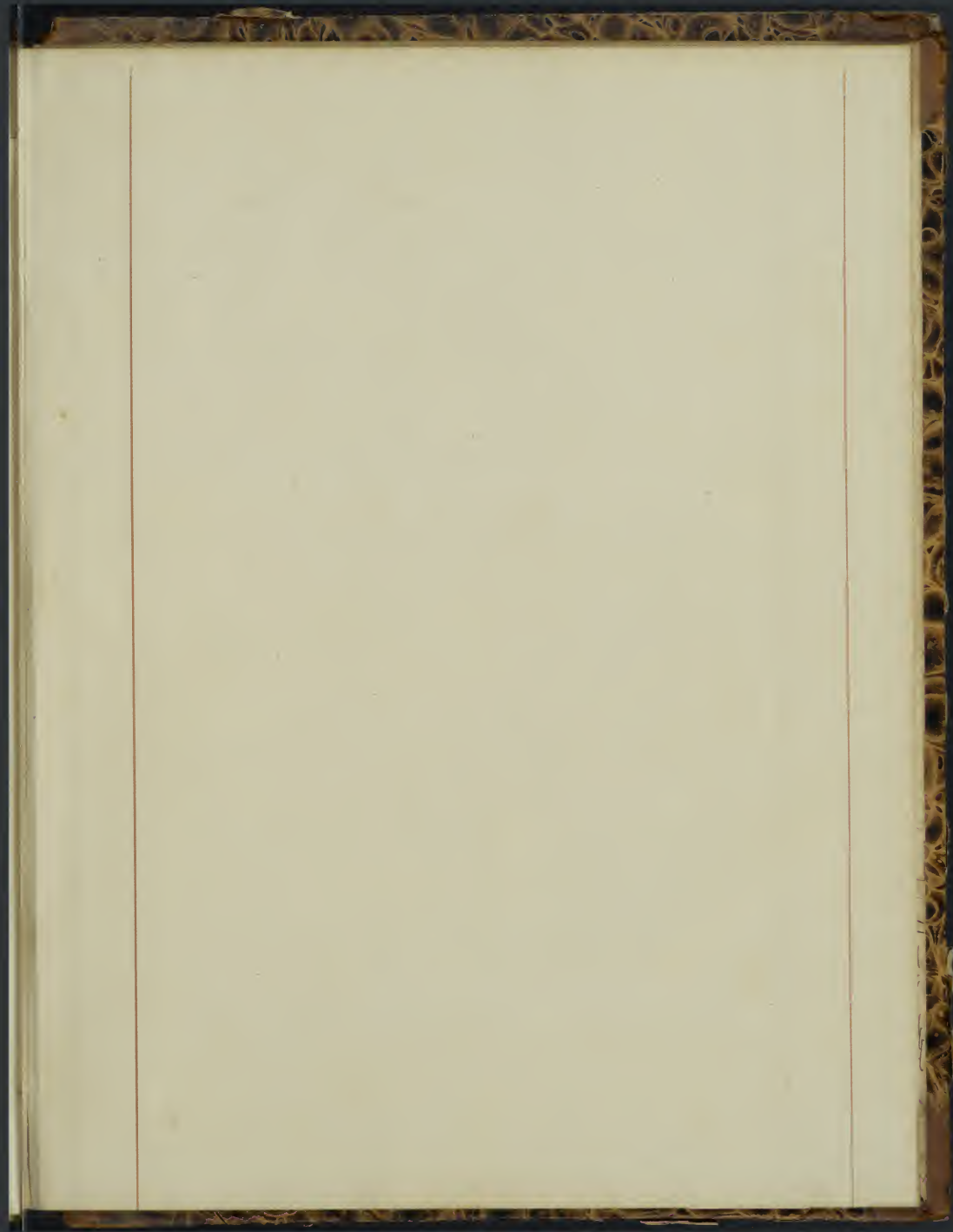
vide "Bailment" com. carrier.

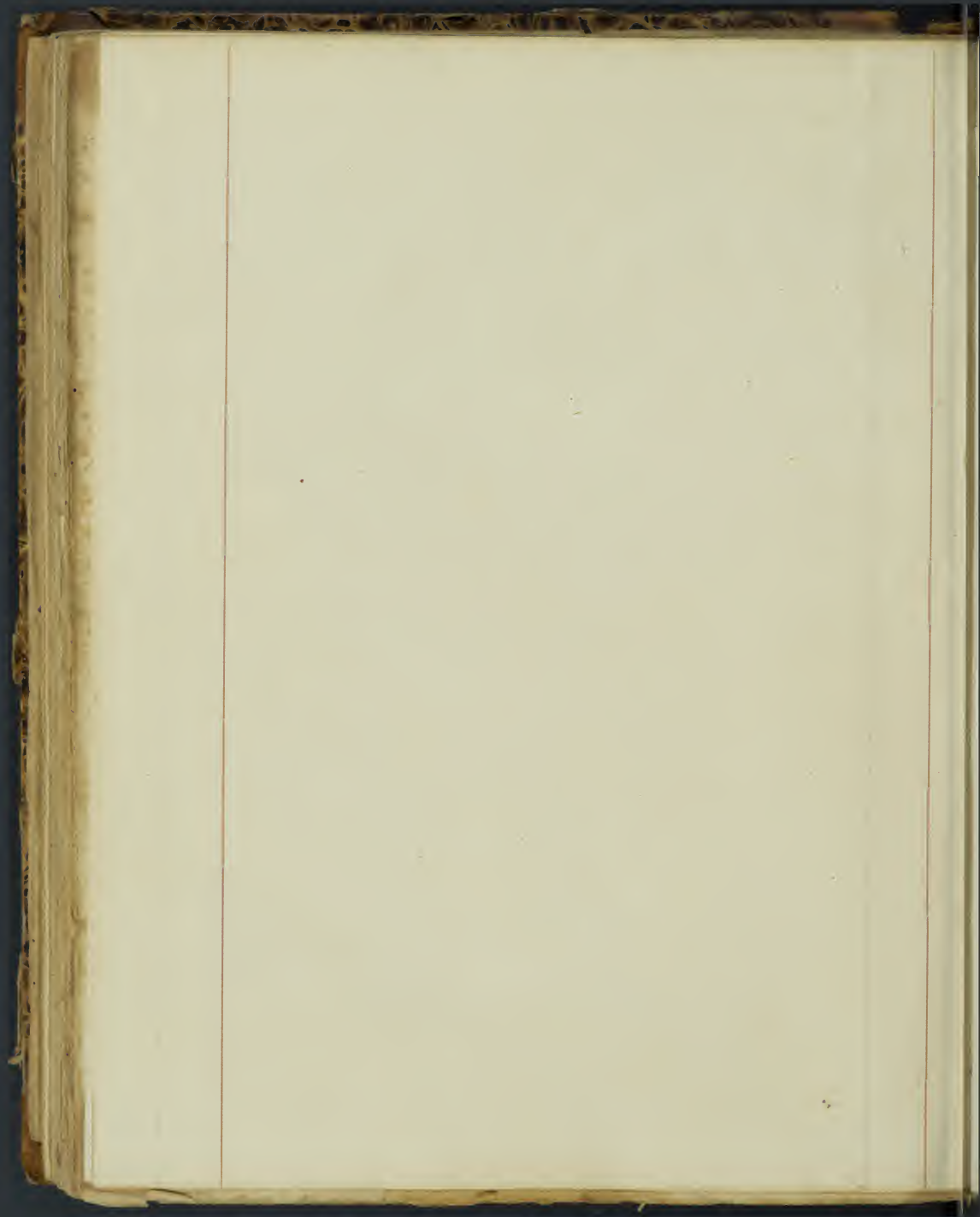
End of Inn Keepers.

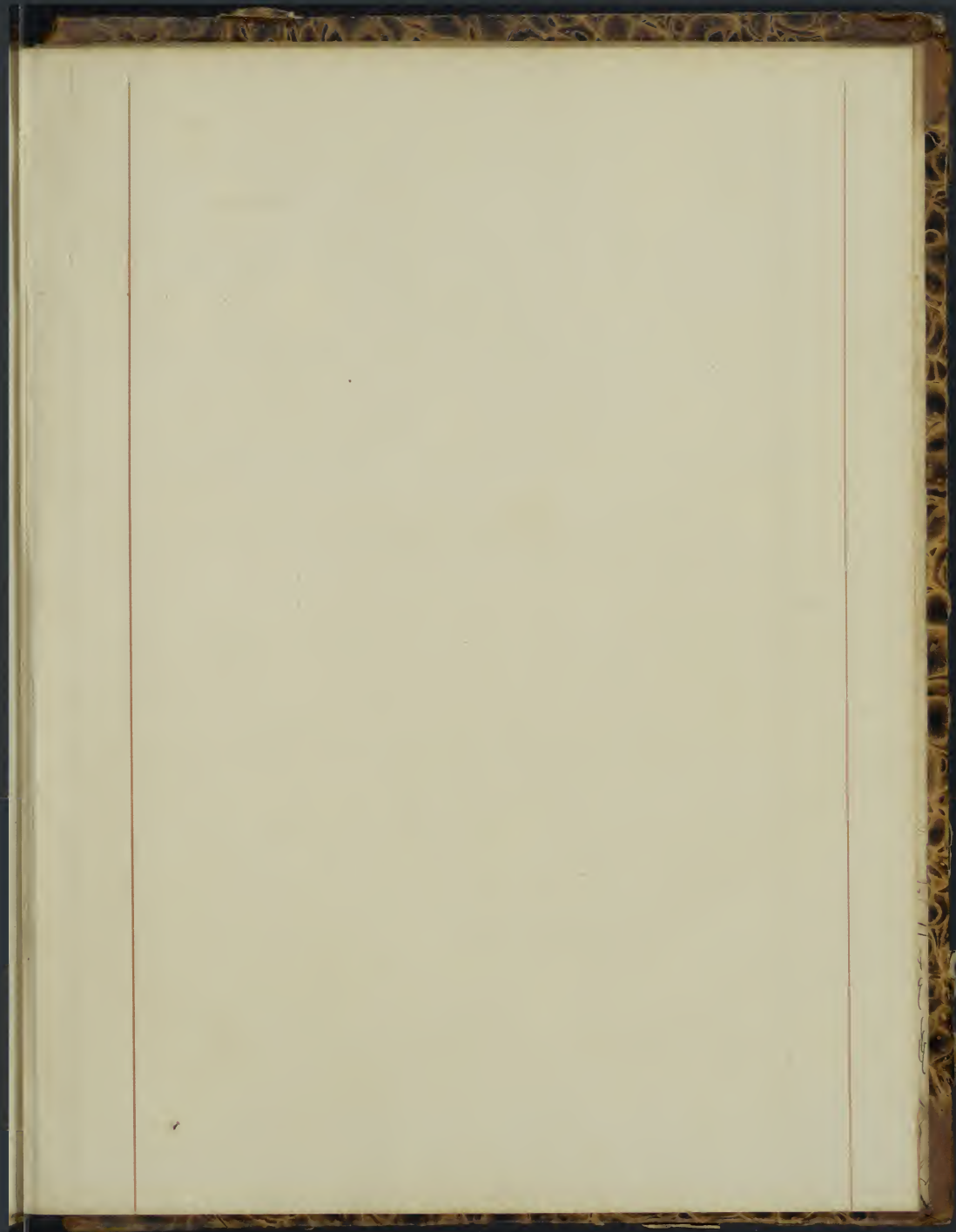


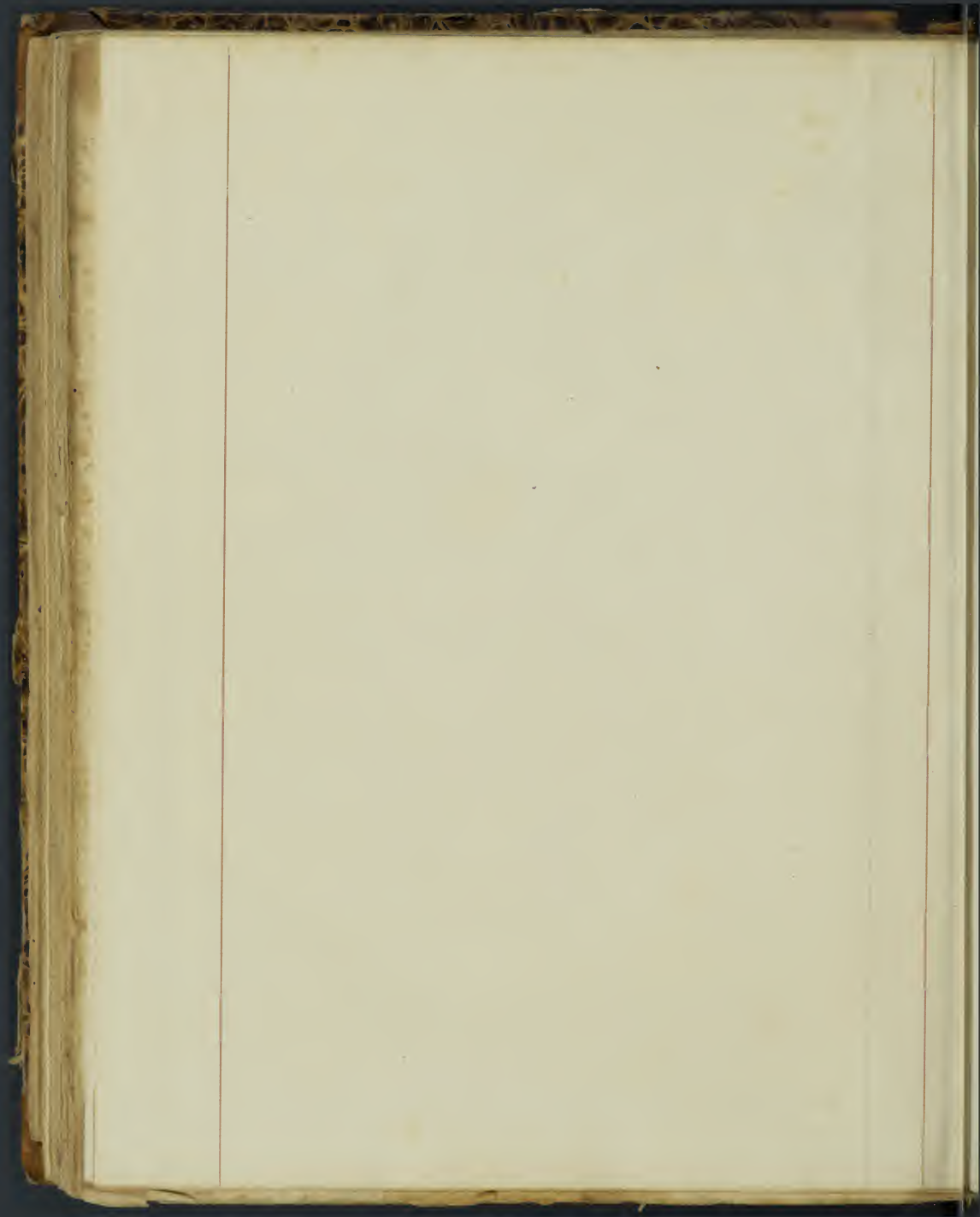


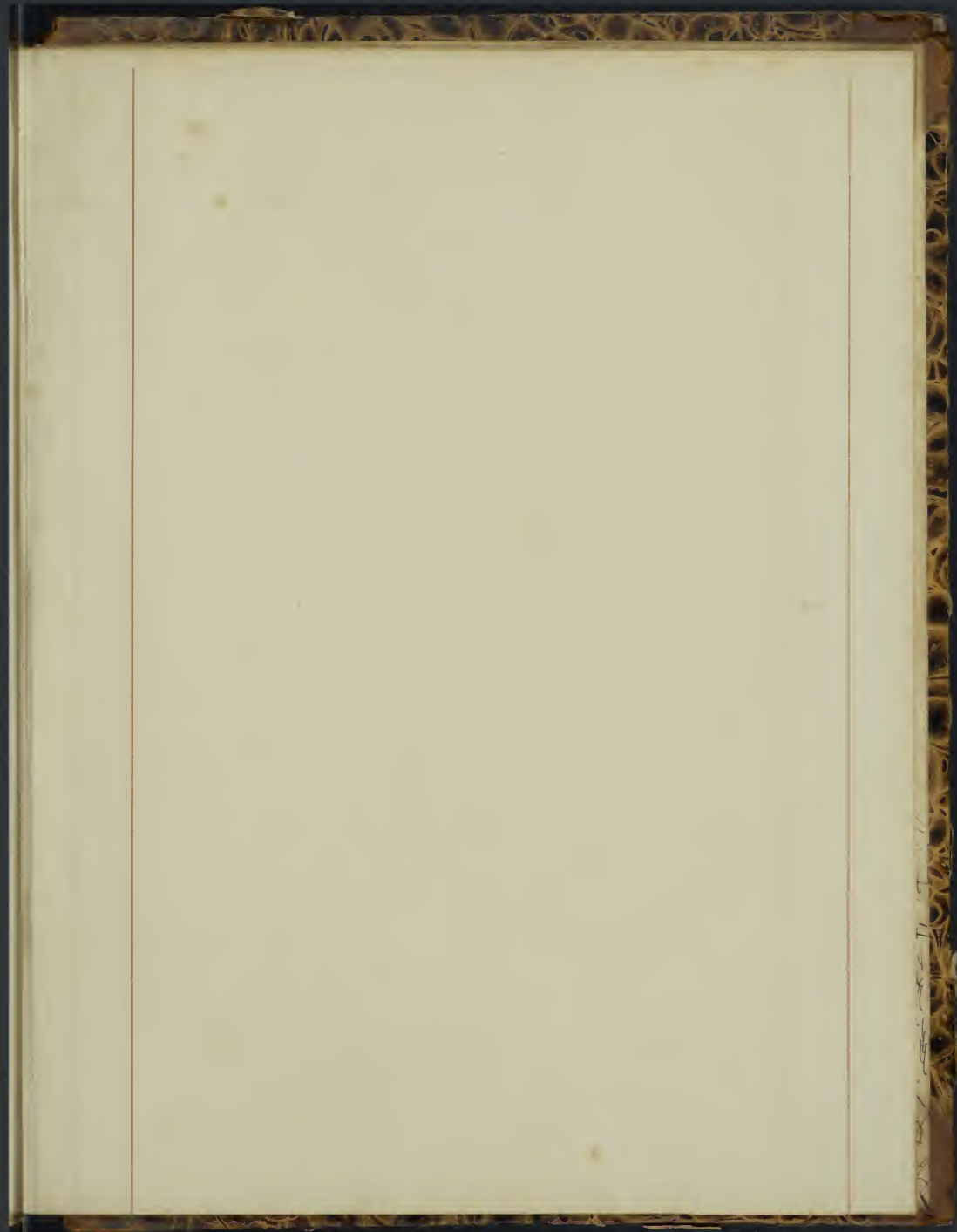


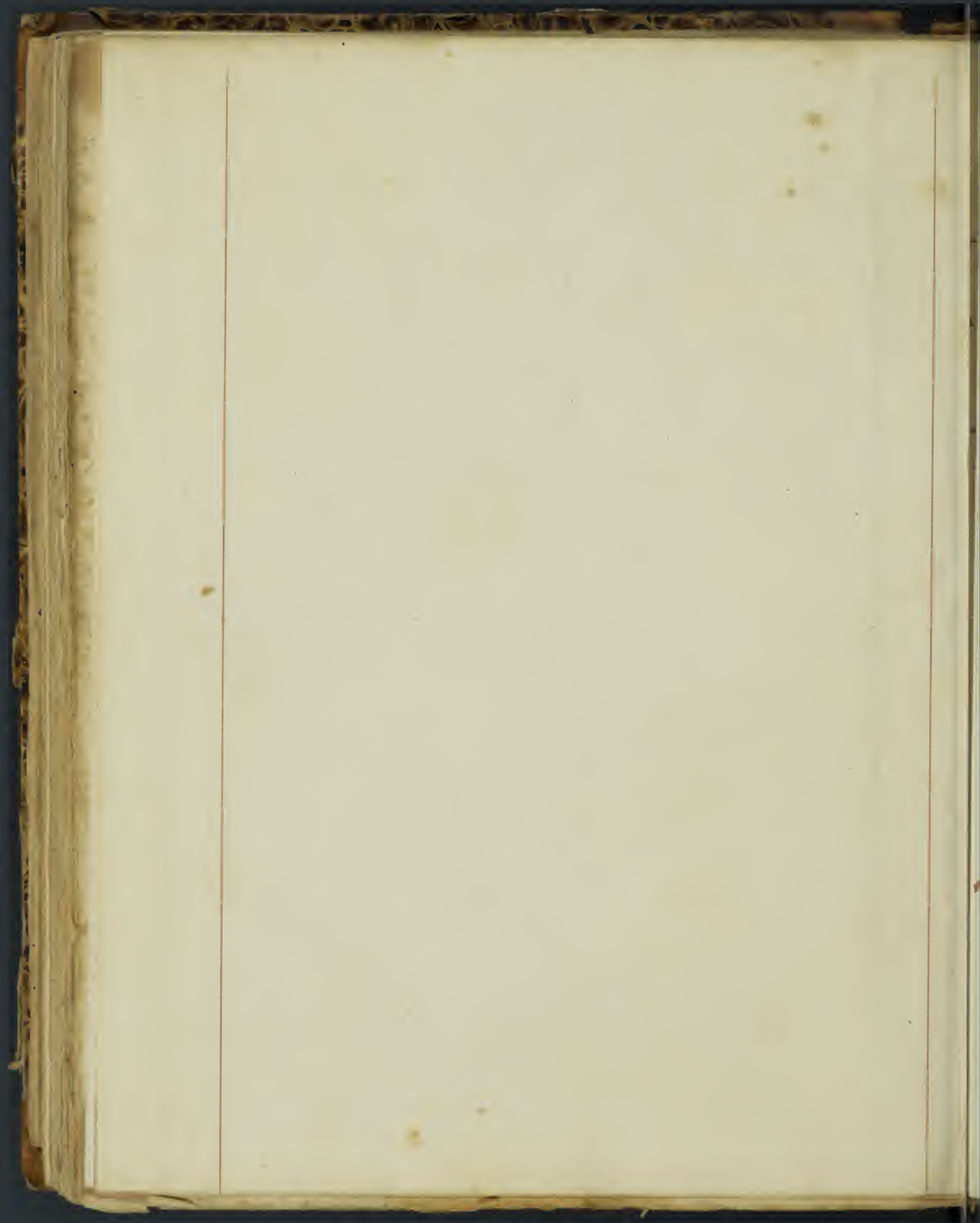




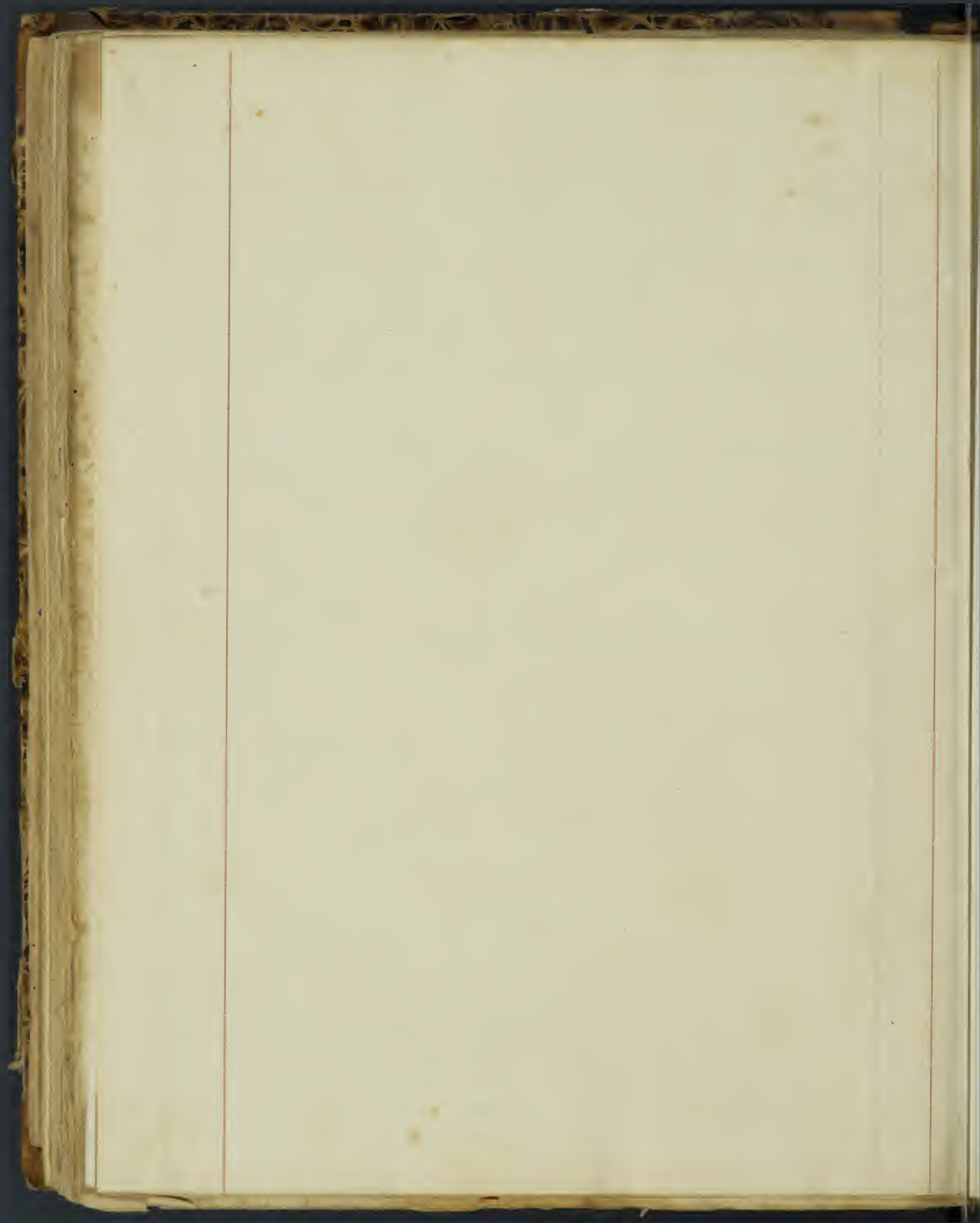




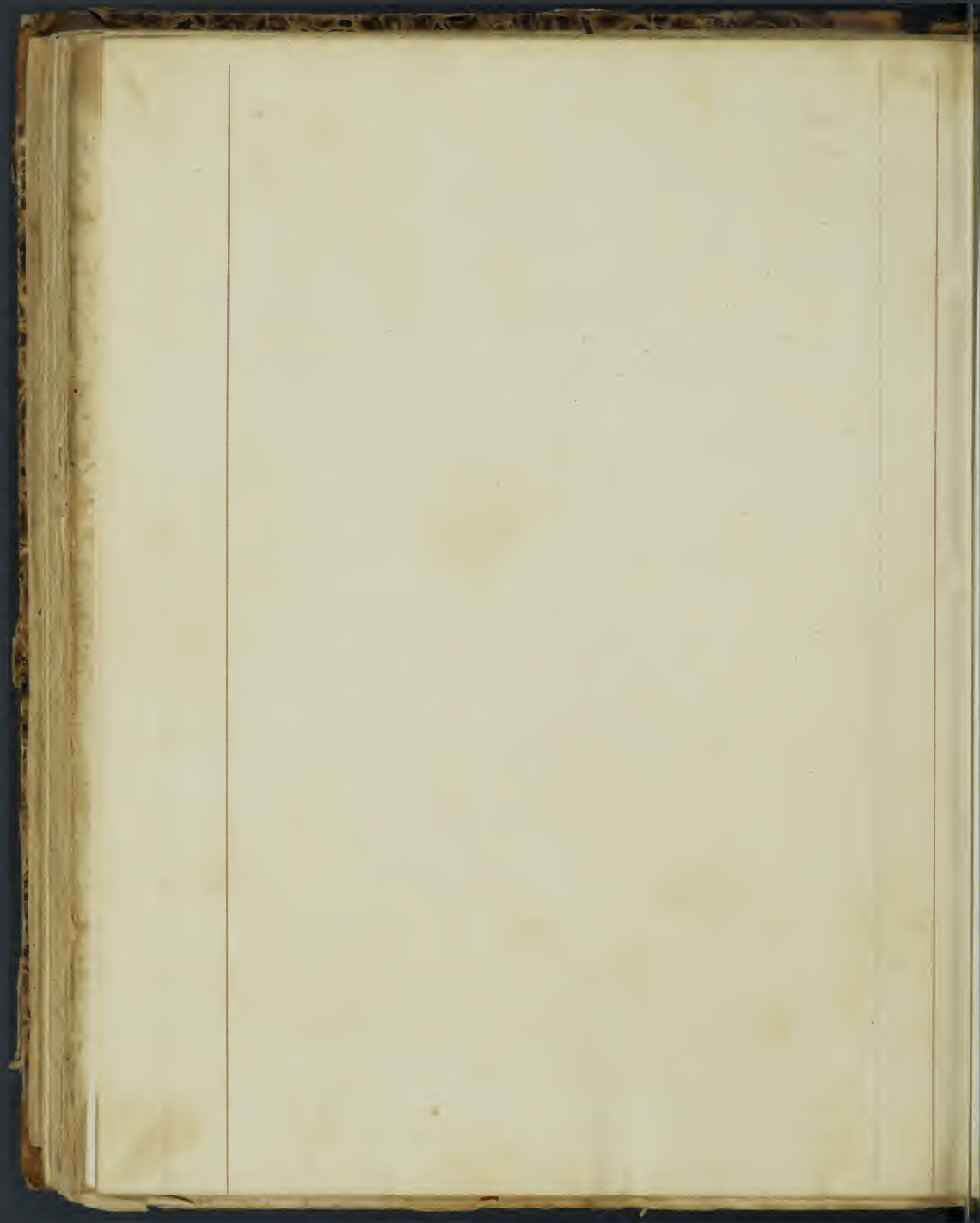




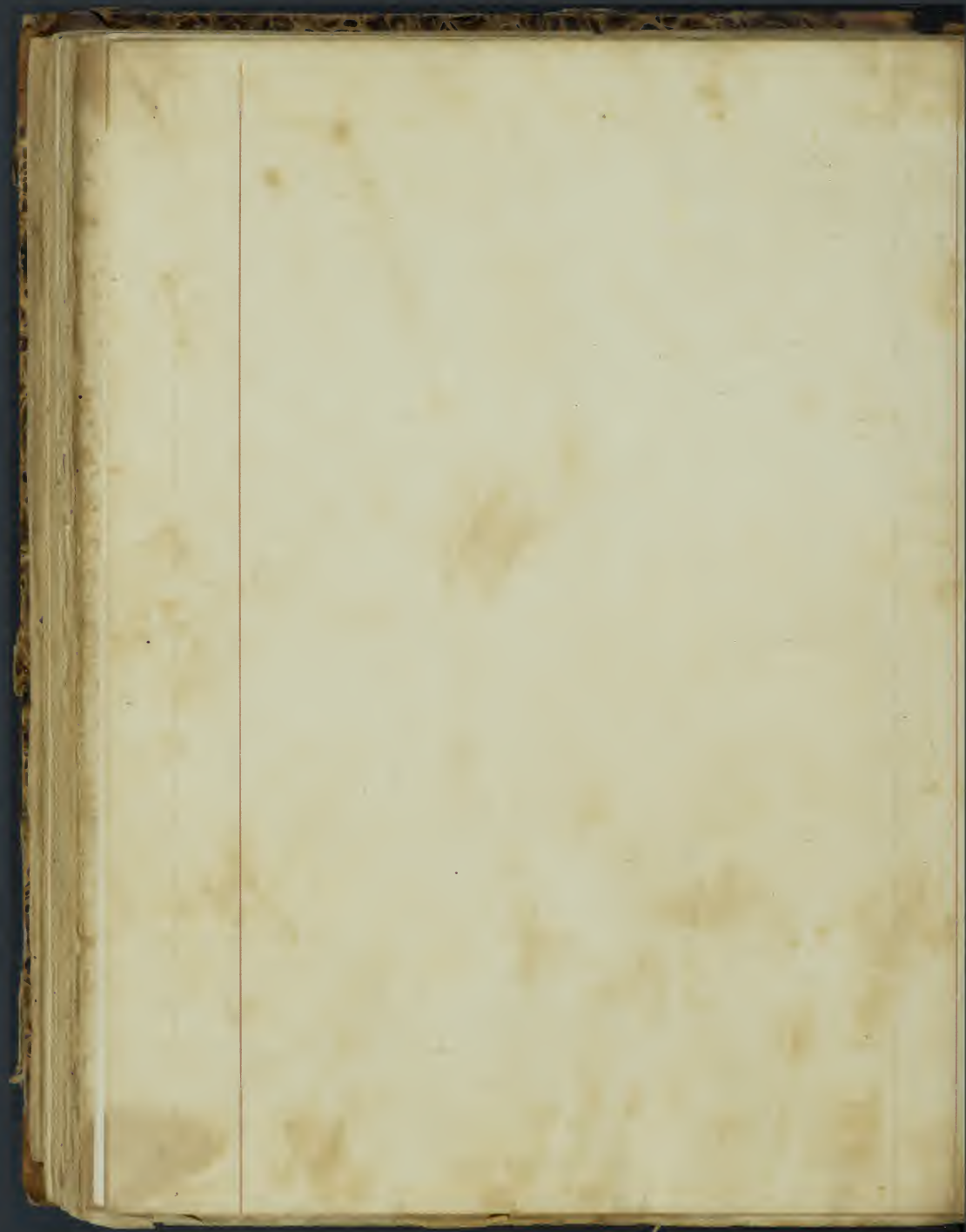
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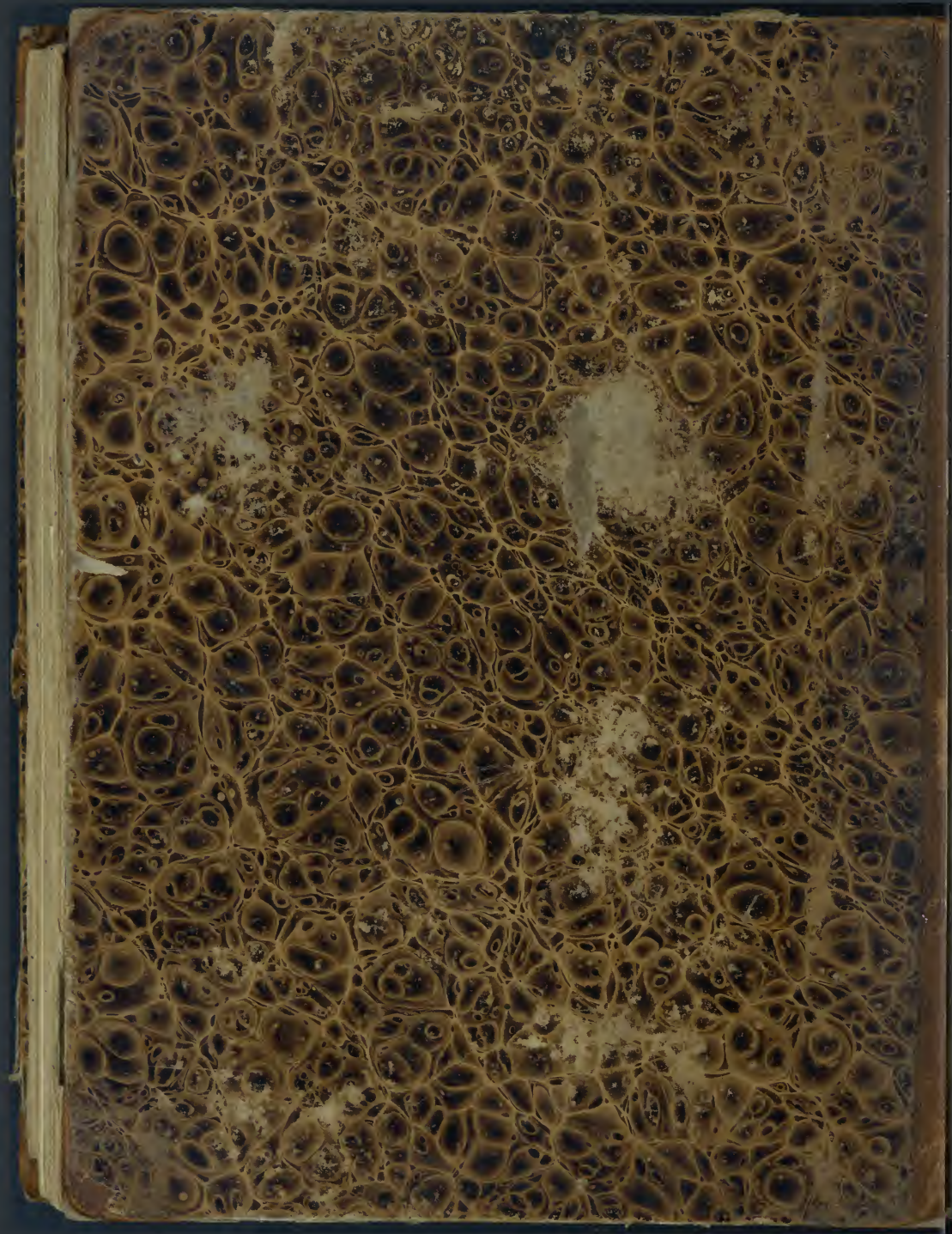
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